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No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1983

YARD-MAN, INCORPORATED,
Petitioner,

-vs-

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE, AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), and LOCAL 134, UAW,
Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

GROMEK, BENDURE & THOMAS
By: Mark R. Bendure
(Counsel of Record)
Attorneys for Petitioner
577 E. Larned, Suite 210
Detroit, Michigan 48226
(313) 961-1525

GARAN, LUCOW, MILLER
SEWARD, COOPER & BECKER, P.C.
By: Joseph Kochis
Attorneys for Petitioner
561 E. Jefferson Avenue
Detroit, Michigan 48226
(313) 962-5180

AMERICAN PRINTING COMPANY
1200 WEST FORT STREET, DETROIT, MICHIGAN 48226 — (313) 963-9310

TABLE OF CONTENTS OF APPENDIX

	Page
Collective Bargaining Agreement	1a
Memorandum Opinion of District Court	75a
Order of District Court	92a
Court of Appeals Order Granting Permission to Appeal	96a
Opinion of Court of Appeals	97a
Judgment of Court of Appeals	141a

AGREEMENT

BETWEEN

YARD-MAN INCORPORATED

Jackson Operation

AND

U.A.W.

LOCAL No. 134

Collective Bargaining Agreement

INDEX

Page

AGREEMENT
- Parties and Inauguration 8a
- Intent and Purpose 8a

RECOGNITION (Article I)
- Contract Limits 9a
- Exclusions 9a
- Union Shop 9a
- Employee Obligation 9a
- Dues and Fee Check Off 9a

COMPANY RESPONSIBILITY
(Article II) 10a
- Company Rights and Obligations 10a

UNION RESPONSIBILITY (Article III)
- Agreement Objectives 11a
- Strikes 12a
  - Procedure 12a
  - Definitions 12a

REPRESENTATION (Article IV)
- Bargaining Committee 12a
- Steward System 12a
- Officer Notice 13a
- Outside Representation 13a
- Union Business—Pay Procedure 13a

INDEX—(Continued)

Page

GRIEVANCE PROCEDURE (Article V)
Time Limit—Initiation 13a
Foreman Notification—Relief 14a
Procedure Steps 14a
Meetings with Management 14a
Arbitration 15a
Settlement - Conditions 15a
Notification (Layoff, Call-in, Etc.) 16a
Disciplinary Action Procedure 16a
Claim Time Limits 17a

ARBITRATION (Article VI)
Arbitrator's Powers 17a
Arbitrator's Fees 19a
Company Grievance 20a

SENIORITY (Article VII)
Vacant Jobs 21a
Voluntary Lay-off 21a
Production Recalls 22a
Temporary Work Interruptions 23a
Reduction in Jobs 23a
New Employees 25a
Union Official Preferential Seniority 25a
Loss of Seniority 25a

INDEX—(Continued)

Page

LEAVES OF ABSENCE (Article VIII)
- Armed Services 27a
- Re-employment and Seniority Rights 27a
- Union Office 27a
- Public Office 27a

HOURS (Article IX)
- Work Week 28a
- Overtime Pay 29a
  - Qualifications 30a
- Bereavement Pay 32a
- Call-In Pay 32a

PRODUCTION STANDARDS (Article X) 33a

WAGES (Article XI)
- Rate and Classification Reference 39a
- Incentive Guarantee 40a
- Shift Premium 40a

HOLIDAY PAY (Article XII)
- Eligibility 40a
- Conditions 40a
- During Vacation or Leave 40a
- Rate of Pay 40a
- Holiday Work 40a
- Lay-Off During Holiday Week 41a

INDEX—(Continued)

Page

VACATION (Article XIII)
- Eligibility 43a
- Payment (Rate and Time) 43a
- Time Off 43a
- Retiree or Deceased 43a
- Mandatory Retirement 43a
- Vacation Requests 44a

GENERAL WORKING CONDITIONS (Article XIV)
- Payday Schedule 44a
- Alternate Job Pay Rate 44a
- Foremen Work Limitations 44a
- No Discrimination 44a
- Union Bulletin Board 44a
- Monthly Union Meetings 45a
- Correct Address Responsibility 45a
- Reduced Hours Procedure 45a

IMPROVEMENT FACTOR AND COST OF LIVING (Article XV)
- Application 45a
- Data Source 45a

SUPPLEMENTAL UNEMPLOYMENT BENEFITS (Article XVI)
- Reference Source 45a

INDEX—(Continued)

Page

INSURANCE (Article XVII)
- Premium Payment 46a
- Availability 47a
- Retirees 47a
- Coverage 48a

PENSION (Article XVIII)
- Reference Source 48a

SAVINGS PLAN (Article XIX) 49a

JURY DUTY (Article XX)
- Supplemental Pay 49a
- Reporting Day 49a
- Notification 49a
- Excused 49a
- Court Pay Statement 49a
- Limitation 50a

WAIVER (Article XXI) 50a

DURATION AND SIGNATURES 50a

APPENDIX A—Plant Rates 52a

SUPPLEMENTAL AGREEMENT "A"
- Factory Branch 53a

SUPPLEMENTAL AGREEMENT "B" 56a

SUPPLEMENTAL AGREEMENT "C"
- Semi Truck Drivers 58a

INDEX—(Concluded)

Page

GENERAL INFORMATION
- The Job from your own Standpoint 60a
- Your Foreman 60a
- Working Conditions 61a
- Physical Examination 61a
- Parking Lots 62a
- Bulletin Boards 62a
- Clock Card 62a
- Telephone Calls 63a
- Attendance 63a
- Pay Checks 63a
- On the job 64a
- Good Housekeeping 64a

SAFETY RULES 65a

RULES AND REGULATIONS 71a

Collective Bargaining Agreement

AGREEMENT

AGREEMENT made as of this nineteenth day of August, 1974 by and between Yard-Man Inc., Jackson Operation, hereinafter referred to as the "Company," of Jackson, Michigan and the International Union, United Automobile, Aerospace, Aircraft, and Agricultural Implement Workers of America (UAW), and its Local No. 134, hereinafter referred to as the "Union."

(1) It is understood that in the event the Company shall sell, assign, lease or otherwise dispose of its Jackson Operation or any part thereof, the Union shall have the sole and exclusive right to represent its members, with respect to the negotiation of wages, hours, and other terms and conditions of employment with such purchasee, assignee, lessee, or transferee.

INTENT AND PURPOSE

It is the intent and purpose of the Parties hereto, this Agreement shall promote and improve industrial and economic relationship between the Company, the Union, and the employees (as hereafter defined) employed by the Company at the Jackson, Michigan Plant and is set forth herein the basic agreement covering rates of pay, wages, hours of employment and other conditions of employment to be observed between the Parties. It is the intent of the Parties hereto, to prevent strikes and lockouts and to facilitate the peaceful and timely adjustment of all grievances and controversies which may arise from time to time between the Company and its employees covered by this Agreement. The Parties also intend to encourage increased efficiency among the employees. The Parties hereto recognize the common interest of management and the Union in the success of the business of the Company.

(1) It is understood that in the event the Company shall sell, assign, lease or otherwise dispose of its Jackson Operation or any part thereof, the Union shall have the sole and

exclusive right to represent its members, with respect to the negotiation of wages, hours, and other terms and conditions of employment with such purchasee, assignee, lessee, or transferee.

ARTICLE I

Recognition

Section 1. The Company agrees to recognize the International Union, United Automobile, Aerospace, Aircraft, and the Agricultural Implement Workers of America, (UAW), and its Local Union No. 134 as the exclusive bargaining agent for all production maintenance employees, and truck drivers at its Jackson operation located at 1410 West Ganson Street, Jackson, Michigan, with respect to rates of pay, wages, hours of employment and other conditions of employment.

Section 2. The term "Production and Maintenance Employees" shall not include supervisors, foremen, assistant foremen, plant guards, office and clerical employees.

Section 3. Except for those employees included in Section 2 above, all employees on the seniority list and all new employees after thirty-one (31) days, shall as a condition of employment, pay all dues and initiation fees.

Section 4. Upon authorization of individual employees the Company, during the life of this Agreement, will deduct from the wages of all employees in the Bargaining unit, initiation fees and current dues. Deduction will be made by the Company from any wages due the employee the first pay period of each month, after the first thirty-one (31) days. If the employee has no pay coming for the first pay period, such dues shall be deducted from his pay for the third pay period ending in such calendar month.

The sole obligation of the Company shall be to deduct such dues from such wages as may be due the employee and to remit the same to the Financial Secretary within one week after the deduction so made. Any disputes as to dues shall be entirely between the employee and the Union.

Section 5. There are no understandings or agreement or past practices which are binding on either the Company or the Union other than the written agreement enumerated or referred to in this Agreement. No further agreement shall be binding on either the Company or the Union until it has been put in writing and signed by both the Company and the Union Bargaining Committee.

ARTICLE II

Company Rights

Section 1. The Company shall manage the plant and direct the working forces. The management of the plant includes among others the right to assign work to employees, to plan, direct and control plant operations, to hire, promote, demote, suspend or discharge for proper cause, to retire or to transfer employees, and the right to lay-off and relieve employees from duty because of lack of work or for any other legitimate reasons, and the right to introduce new or improved methods of facilities or to change existing production methods or facilities.

The union recognizes that the company has in the past and will in the future be required to contract out some maintenance work.

The company agrees that in determining what work shall be contracted out it will be guided by the following considerations.

a. The skill of its employees to perform the work.

b. The manpower requirements to perform the work.

c. The time involved to have the work performed.

d. The equipment necessary to perform the work.

e. The capacity and ability to perform the work.

The Company further agrees that whenever possible it will inform the bargaining committee of its decision to contract out work at the regularly scheduled monthly meeting of the bargaining committee and shall state its reason for each decision. In all cases the bargaining committee will be notified before the work is sub-contracted.

The Company shall have the right to make and enforce shop rules and regulations not inconsistent with the provisions of this Agreement. The choice, control and direction of the supervisory staff is vested exclusively in the Company. These rights will not be used for the purpose of discrimination against any employees because of Union activity and further that said powers and rights shall be exercised in accordance with the provision of this Agreement, including the grievance procedure. The right to determine the products to be manufactured or processed, the extent of operations and places of manufacture is vested with management. In the event the company should elect to move the entire plant operation to another location, representatives of the company and the Union will meet without delay and negotiate the matter of transfer rights of the employees, and job opportunities for the employees at the new location.

ARTICLE III

Union Responsibility

Section 1. The Union recognizes that the primary objective of this Agreement is to promote orderly and peaceful relations between the Company and its employees in order to attain efficient and uninterrupted operation of the Company's plant.

Section 2. It is recognized that this contract is intended to set forth the rights and obligations of the Company to the Union and the employees it represents, and that the grievance procedure set forth herein gives them full redress for any grievance arising from this Agreement.

Section 3. In the event of any controversy, dispute, or grievance whatsoever, the Union and it's members, individually and collectively, agree that they will not participate in any strike on any issues that are not arbitratible until all of the procedures set forth herein have been specifically followed. First, the grievance procedure shall have been exhausted; second, the issues in dispute have been presented in writing by the Union to the Company, and negotiations have continued with respect thereto over a period of fifteen (15) days; third, strike action has been fully authorized by two-thirds vote by secret ballot of all employees present at a meeting called by the Union for that purpose. The Union agrees that it will give the Company three (3) days notice prior to taking strike action. If no strike is taken on the fourth day the issue will be considered dropped.

In no event shall a strike take the form of a sit-down, stay-in, slow-down or comparable curtailment of work as contrasted with a walk-out. The bargaining Committee agrees that as part of the consideration of this Agreement it will take immediate steps to end any unauthorized stoppages, strikes, intentional slow-downs or suspension of work.

ARTICLE IV

Representation

Section 1. The employee shall have the right to be represented by a shop Bargaining Committee of five (5) members, plus a Recording Secretary to record the minutes only if desired. The Company shall negotiate with the Bargaining Committee as the representative of all employees covered by this Agreement for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.

Section 2. The Union may elect a maximum of one (1) Steward for each Foreman or Department on a shift to carry out and maintain a working Steward system. The

Union may also elect one (1) Chief Steward per shift. It shall be the duty and privilege of the Stewards of their respective sections to present to the Company, in a manner hereinafter set forth, any grievance of employees who are employed in such sections if and when the Steward is requested to do so.

Section 3. The Union shall furnish the Company in writing the names of duly constituted officers, Chief Steward and Stewards and the Union Bargaining Committee, and shall keep the Company advised of any changes therein.

Section 4. Both the Union and the Company may bring in such additional representatives as either may desire for the purpose of negotiating contracts or handling grievance at any time except at the first, second, and third steps of the Grievance Procedure.

Section 5. Any member of the Bargaining Committee when attending a scheduled meeting called and approved by the Company and with management people for the settling of a grievance or for negotiations in a renewal of this contract, shall be paid at his average hourly rate for the previous week for such time as falls within his regular working hours.

Section 6. Any Steward or Chief Steward shall be paid when attempting to settle a grievance in accordance with the Grievance Procedure contained in this contract at his average hourly rate of the previous week for such time as falls within his regular working hours. If overtime is involved, and it is authorized it shall be paid at time and one-half.

ARTICLE V

Grievance Procedure

Section 1. When an employee or group of employees have a grievance arising under the terms of this Agreement,

it shall be processed in accordance with the procedure hereinafter provided and steps one, two, and three shall be completed within three (3) working days.

The privilege of Stewards and Chief Stewards to leave their work areas during working hours is granted for prompt handling of grievances. In no case will a Steward or Chief Steward leave his department or enter another department without notifying his foreman and the foreman of the department he wishes to enter. If the Stewards or Chief Stewards Foreman is not available, they will notify the General Foreman. Relief will be given within thirty (30) minutes.

Step 1. Any employee having a grievance shall first take the grievance up with the Foreman of his department. It shall be compulsory for the Foreman to send for the Steward of the department if the employee so requests. The Foreman will use his best efforts to settle the grievances but not inconsistent with the terms of this agreement and in the presence of his Union representative.

Step 2. If the Steward and the Foreman are unable to adjust the grievance, the Foreman will immediately notify the Chief Steward and relief will be given to the Chief Steward within thirty (30) minutes. The Chief Steward will then have fifteen (15) minutes to discuss the problem with the Steward. During this time the Foreman will contact the General Foreman or Department Manager depending on who he works for. The meeting between the Steward, Foreman, Chief Steward, and General Foreman (or department manager) will then be set up. This meeting will take place within thirty (30) minutes of the meeting of the Steward, and the Chief Steward unless this time period is extended by mutual consent and the meeting will not exceed thirty (30) minutes. Should overtime be involved, the meeting will be held in the forenoon of the following work day. Any of the meetings or time limits outlined in step 2 may be extended or shortened by mutual consent of the parties involved.

Step 3. Then, if the grievance is not settled, the Steward and Chief Steward will have maximum of thirty (30) minutes to reduce the grievance to writing. On forms provided by the Company, one copy will be presented to the Industrial Relations Manager and one copy will be presented to the Bargaining Committee within one working day from the meeting in Step 2 or the grievance will be considered dropped.

Step 4. Then the grievance will be put on the agenda of the next scheduled grievance meeting held between company representatives and the Union Bargaining Committee. Grievance meetings will be held on the first and third Wednesday of the month, if there are grievances in this step to be discussed, at 1:00 p.m. Prior to the meeting thirty (30) minutes will be allowed for the Chief Steward and the Union Bargaining Committee to discuss grievances. It will be the intent of both parties to answer the grievance at this meeting. If either party requires more time to answer the grievance the following time limits will apply:

(a) Within five (5) working days after the meeting the Company will answer the grievance. If management fails to answer within this time period the grievance will be considered granted. The Union must then answer within five (5) working days of receiving managements answers or managements answers shall be considered to have satisfactorily settled the grievance.

If the Bargaining Committee and Company representatives cannot settle the grievance at this meeting the grievance may be put on the agenda of next scheduled grievance meeting as number one priority and the International Representative and the Manufacturing Manager will be invited to this meeting to attempt to settle the grievance. If the grievance is not resolved at this meeting it will be moved on to step 5.

Step 5. Any grievance unresolved by the aforesaid and stated grievance procedures shall be referred to arbitration under Article VI of this Agreement within thirty (30) days of the Union's answer in step 4, with the exception of grievance on issues specifically excluded as indicated in Article VI.

Section 2. Meeting of the management and the Union Bargaining Committee will be held once monthly for the purposes other than settling grievances on the last Wednesday, unless otherwise agreed by mutual consent, the meeting shall begin at 12:30 p.m. An agenda for this meeting shall be submitted to the Company by the Chairman of the Bargaining Committee one (1) week prior to the meeting. If no agenda is presented by the Union, the meeting will be automatically cancelled for that month. Management will reserve the right to arrange a meeting with the Bargaining Committee at any time the necessity of such meeting should arise.

Section 3. Any settled grievance shall be reduced to writing, stamped by the Chairman of the Bargaining Committee, and a representative of Management.

Section 4. The Bargaining Committee Chairman shall be notified in writing of lay-offs, call-ins, terminations and leaves of absence. It is intended that this notification will be prior to occurrence, if possible.

Section 5. When disciplinary action is taken against an employee by the Company because of violation of the Company's rules and regulations, the Company will request the departmental Steward and Chief Steward to be present in the event disciplinary lay-off or discharge is to be administered to any employee other than a probationary employee. Grievances regarding such disciplinary action will be recognized only if filed within three (3) working days of the disciplinary action.

Section 6. No claims, including claims for back wages, by an employee covered by this Agreement, or by the Union, against the Company shall be valid for a period prior to three (3) working days before the date the grievance was filed in writing, unless the circumstances of the case made it impossible for the employee, or the Union, as the case may be, to know that he or the Union, had grounds for such a claim prior to that date, in which case the claim shall be limited retroactively to a period of ten (10) working days prior to the date the claim was first filed in writing.

ARTICLE VI

Arbitration

Section 1. Mandatory Arbitration

Grievance not resolved under the grievance procedure set forth in the preceding article, if not withdrawn by the Union may be referred to arbitration in accordance with the procedures outlined in this article.

It is understood that any grievance unresolved by the grievance procedures set forth in the preceding article shall be deemed to have been abandoned by the grieving party unless they shall be appealed to arbitration in accordance with the provisions of this article. It is further understood that either party may withdraw a grievance at any step of the proceedings including the arbitration process and such withdrawal shall resolve the grievance without prejudice to the right of any employee to file grievance under similar circumstances.

Section 2. Within thirty (30) days of the receipt of the Step 4 response to the grievance the Union may give notice of appeal of such resolution or non-resolution of the grievance in writing to the Company of their intent to appeal the resolution under the process set forth herein. Upon receipt of the notice to appeal the Company and the Union shall meet within three (3) working days to agree upon the

selection of an Arbitrator. In the event the parties are unable to agree upon the selection of the Arbitrator they shall request a list of five (5) Arbitrators from the Federal Mediation and Conciliation Service. The Arbitrator will be selected from the list of Arbitrators submitted by the Federal Mediation and Conciliation Service, by each party alternately striking a name from the list until only one name remains. A flip of the coin will determine who strikes the first name. The designated Arbitrator will arrange the time and date. It is suggested that the hearings shall be conducted under the following procedural rules:

(A) Each parties case shall be presented by a designated representative.

(B) (No post hearing brief)

(C) The hearing shall be informal with informal rules of evidence.

(D) If either party introduces written material or any other type of evidence such as arbitrators awards or documents, copies will be given to the Arbitrator and the opposing party at the time of such introduction.

Section 3. Plant Visits

After a case has been appealed to the Arbitrator, but prior to the Arbitrator's hearing the case, the International Union Representative, or a specified member of his staff, will be granted permission to visit the plant for the purpose of investigating the specific grievance and determining its merits.

Section 4. Arbitrator's Powers

It shall be the function of the Arbitrator within thirty (30) days after a hearing to make a decision, provided it is the type of case on which the Arbitrator is authorized to rule. The Arbitrator shall have no power to add to or to subtract from or modify any of the terms of this Agreement; nor to establish or change any wage rate; nor to rule on any

dispute regarding production standards; nor to rule on any dispute regarding health or safety or matters of new or changed job classifications. The Arbitrator shall have no power to rule on any issue or dispute arising under the Waiver Section of this Agreement. Any case appealed to the Arbitrator on which he has no power to rule shall be referred back to the parties without decision.

Section 5. The Arbitrator's fee and expenses shall be paid by having payment for the first two (2) cases the first year and the first case each of the second two (2) years paid from the canteen fund and all additional cases, during the contract, will be paid by the loser. Each party shall bear the expense of preparing and presenting its own case except that with respect to each grievance being arbitrated. Up to three (3) members of the Bargaining Committee and one (1) witness on behalf of the Union, one of whom may be the grievant, may attend such arbitration hearings without loss of pay for any such time so spent during their regularly assigned eight (8) hour shift. The foregoing grievance procedure is the exclusive means available to the Union for settling disputes during the duration of this Agreement. Neither the Union or any employees shall seek judicial interpretation or relief for alleged violation of this Agreement such remedies being hereby specifically waived. The time limit specified in the grievance procedure may in any individual case be extended by a mutual agreement between the Company and the Union.

It is specifically understood that there shall not be any strike, sit-down, stay-in, slow-down, or any other curtailment or restriction of production in the Company's plant or on its premises at any time during the term of this Agreement. The exception to this paragraph is that the following matters shall not be subject to the arbitration procedure:

(A) Matters of health and safety.

(B) Matters covering Production Standards.

(C) Matters of new or changed job classifications.

(D) Matters to establish or change any wage rate.

Section 5. The Company may at its option discipline including discharge any or all employees violating any provision of Section 1 of this article. Subject to the right of the Union to contest any such discipline or discharge through the grievance procedure.

Section 6. Retroactive Claims

No claims, including claims for back wages, by any employee covered by this Agreement, or by the Union, against the Company shall be valid for a period prior to the date the grievance was first filed in writing, unless the circumstances of the made it impossible for the employee, or for the Union as the case may be, to know what he, or the Union had grounds for such a claim prior to that date, in which case the claims shall be limited retroactively for a period of ten (10) working days prior to the date the claim was first filed in writing.

Section 7. Retroactive Precedent

No decision of the Arbitrator or of the Company in one case shall create a basis for retroactive adjustment in any other case prior to the date of written filing of each specific claim.

Section 8. Appeal from Decisions

There shall be no appeal from the Arbitrator's decision, which will be final and binding on the Union and its members, the employee or employees involved, and the Company. The Union will discourage any attempt of its members, and will not encourage or cooperate with any of its members, in any appeal to any Court or Labor Board from a decision of the Arbitrator.

Section 9. Company Grievance

Any grievance which the Company may have against the Union shall be presented by the Plant Management involved to the Shop Committee. In the event the matter is not satisfactorily adjusted in two (2) weeks after such presentation, it may be appealed in writing to the International Union Representative, UAW, for his consideration and disposition. If the matter is not satisfactorily settled by them within five (5) days thereafter by agreement, the case may be appealed to the Arbitrator.

ARTICLE VII

Seniority

Section 1. Definition

(a) Seniority shall be from the last hiring date. Shop-wide seniority shall be observed in all matters except as specifically provided in this Agreement.

Section 2. Vacant Jobs

(a) The Company intends to have its employees work the jobs of their choice as nearly as possible, consistent with their ability to perform the work and their seniority. This shall be accomplished as follows:

(b) If a vacancy occurs it shall be immediately so advertised on the plant bulletin board. Employees eligible to bid shall make application to the bid box. Qualifications are determined by the Company in regards to skill and semi-skill jobs. All other jobs will be given to the most senior employee. Notification of the employee selected with his clock number shall be posted on the bulletin board.

(c) New employees attaining seniority will also be eligible to bid vacant jobs.

(d) To be eligible to bid a vacant job in a given classification, an employee must have worked at lease six (6) months in a classification.

(e) An employee having received a classification under the bid system will pick a department and shift, and shall remain in such a classification for not less than six (6) months, unless the vacancy as bid is terminated.

(f) Employees shall be given preference for the 1st, 2nd and 3rd shifts according to seniority at the time they bid a classification and shall remain on that shift for a period of not less than six (6) months.

Section 3. During end of season shut-down if any employee's bid job is eliminated the employee may elect to take a voluntary lay-off up to two (2) weeks prior to inventory, inventory or two (2) weeks after inventory until his bid job resumes or six (6) weeks which ever comes first.

Section 4. Production Recalls.

(a) When production resumes or recalls are necessary employees will be recalled as follows:

(1) Indirect labor and automatic department employees.

Employees will be recalled by classification in order of seniority. If the employees in the classification with more seniority than the bid man on the job elect not to accept the recall the bid man on the job will be required to work.

(2) Individual incentive, group incentive, and paint dept. employees.

Employees may be recalled by department in order of seniority for a maximum of two (2) weeks (10 working days) without regard to plant-wide seniority. After two (2) weeks plant-wide seniority will prevail.

(b) When a worker's bid department begins to function and as his seniority permits, management will recall the man to his bid department as soon as possible consistent with efficient operations.

Section 5. Temporary Work Interruptions.

(a) In the event of temporary work interruptions or schedule change in any department due to any occurance, the company may lay off any employee at any time with the following exceptions: the Union Bargaining Committee, Financial Secretary, Recording Secretary, and the Chief Stewards will be retained plant-wide on their shift. Departmental stewards will be retained within their department on their shift only if there is work being performed in their department.

If a portion of a department continues to function without interruptions for any portion of the temporary lay-off period, the bid man on the job will be required to work.

Management has the right to work other departmental employees as long as other work is available in any department.

(b) After ten (10) working days he may replace the youngest man in another department consistent with his seniority and his ability to perform the work, and forfeit his right to return to his former department when it it resumes, the new department then becomes the employees bid department.

Section 6. Reduction in Jobs - End of Season

(1) The Company will lay off by department as follows:

(a) All probationary employees in the department except Journeyman card carriers. Journeyman card carriers may be laid off at management's discretion, by seniority.

(b) Senior employees in the department may work all open job in their department, which the employee is qualified to perform.

(c) After following (a) and (b) above, the remaining employees may be laid off, but not to be inconsistent with plant-wide seniority by more than two (2) weeks.

When there is work to be performed and a department or classification is exhausted, then plant-wide seniority will prevail providing the employee has the ability to perform the work. Also, if there is no classification such as inventory, etc., plant-wide seniority will prevail. If the senior employees elect to take voluntary lay off the lesser senior employees will be required to work. When a classification or a department is completely eliminated, after twenty (20) days employees affected will select a classification, department and shift according to their seniority and ability to perform the work. Within twenty (20) days, the employees displaced will select a job following the same procedure as outlined above.

The total accumulated time that plant-wide seniority cannot be exercised during a *production season as described in section 3, 4, and 5 of this article must not exceed twenty (20) working days. In the event the employee elects to take a voluntary lay off, the time off will not be accumulated for his twenty (20) working days. During temporary layoffs of less than a full day's time to be accumulated toward the employees twenty (20) days shall be as follows:

A. If the employee is sent home before lunch, the time will be considered one-half day.

B. If the employee is sent home four (4) times between lunch break and the last break of the shift, the four (4) times will be considered as one (1) full day.

C. If the employee is sent home anytime from the beginning of the last break to the end of the shift the time will not be counted toward the twenty (20) accumulated days.

* The Production season will be from June 1 to May 31st.

Section 6. When necessary for the efficient continuation of production, the Company may temporarily transfer any qualified employee to any job on his shift. Such time shall not exceed five (5) days per six (6) months (unless agreed to

by the employee involved) and during this time the employee shall be paid the rate of the job or the rate of his bid job, whichever is greater. (For incentive employees the rate of his bid job will be the prior week's average).

Section 7. New employees shall be classified as probationary employees for the first three (3) calendar months of their work, during which period there shall be no seniority rights and after which there shall be established seniority rights from the last hiring date. The right of discharge is reserved exclusively to the Company before seniority rights are established.

Section 8. Seniority Rights of Union Officials

(A) To aid the work of the Bargaining Committee, the Company agrees that the President, Vice-President, Members of the Bargaining Committee, Chief Stewards, Recording, and Financial Secretary shall lead the seniority list in their respective shifts. The above provision prevents the above Union Officials from being removed from their bid jobs while such jobs are in existence, and in no way allows preferential job selection other than what their plant seniority will provide.

(B) A Steward shall hold seniority in his bid department and shift with regards to lay-off and recall only.

Employees names shall not be removed from the Seniority list on account of sickness or injury, providing the Company is notified within three (3) working days of such injury or sickness, unless otherwise agreed to in writing by the Company and the Bargaining Committee. It is expected that every employee will work five (5) days per week, if scheduled.

Employees' names shall be removed from the seniority list for any of the following reasons:

(a) If the employee quits.

(b) If the employee is discharged for proper cause.

(c) If the employee is absent for three (3) consecutive working days without reasonable causes.

(d) When recalled if the employee fails to report for work after notice by telephone or if the employee fails to report for work within seven (7) working days after notice to report has been sent by registered mail or telegram to his last known address according to company records, without reasonable cause or, unless otherwise agreed to in writing by the Company and Bargaining Committee.

(e) If a settlement with the employee has been made for permanent total disability other than provided in the pension plan covered by this Agreement.

(f) If the employee over-stays a leave of absence unless otherwise agreed to in writing by the Company and the Bargaining Committee.

(g) If the employee is continuously unemployed by the Company for a period of twelve (12) months, unless otherwise agreed to in writing by the Company and the Bargaining Committee, provided that if the employee is laid off by the Company for lack of work or he is compelled to be absent on account of sickness as certified by a competent physician, he shall not lose his seniority until the expiration of twelve (12) months plus a period equal to the accumulated seniority to date of lay-off. In the case of sickness, the employee shall be terminated when he is put on a permanent Social Security disability. The seniority in any case shall not extend beyond the termination date of this Agreement.

(h) If an employee shall obtain a leave of absence and during such absence shall utilize such leave for any other purpose than that for which it was granted, he shall automatically lose his seniority with the Company and will be deemed to have quit.

(i) Any employee previously, or in the future, advanced or transferred to a category where union membership is not a condition of employment shall immediately and automatically lose all seniority and other rights obtained under this collective bargaining agreement.

Section 10. Up-to-date seniority lists shall be maintained in the Personnel Department at all times. Copies will be furnished to the respective Foremen and the Committeemen at regular intervals, and they shall have access to the lists in the Personnel Department.

ARTICLE VIII

Leaves of Absence

Section 1. Employee leaving their position with the Company to go into the military service of the United States Government shall have such re-employment rights as the law provides, and in accordance with the contract in-so-far as such is not inconsistent with the law.

Section 2. Employees shall be granted leave of absence for good cause without prejudice to seniority or other rights. A good cause shall be agreed upon by the Management and the Bargaining Committee. Leave of absence will be for a minimum of one entire work week. Any employee selected or appointed to office in the International Union, United Automobile, Aerospace, Aircraft and the Agricultural Implement Workers of America, or Local Union thereof, shall retain seniority rights to the termination of his office. To be valid, such leaves must be signed by a committeeman, the employee, the Industrial Relations Manager and the Production Manager. Employees laid off while on leave will be notified by letter advising them to contact the Personnel Department, and Committee.

Section 3. Any employee, with seniority, elected to public office will be granted a leave of absence for the period of his first term of active service in such elective

office. Additional leaves may be granted upon written application, but must be approved by both the Company, and the full Union Bargaining Committee.

Section 4. If it is determined that any employee is incapable of performing his or her job due to physical or mental problems or presents a safety or health hazard to other employees, such employee may be required to submit to a medical examination to be paid for by the Company. Any employee who refuses to submit to such examination may be suspended without pay for so long as he or she shall refuse. Provided, however that such employee shall have the right to contest the medical findings should adverse action be taken against him or her as a result of such medical examination.

ARTICLE IX

Hours

Section 1. The normal work week shall consist of forty (40) hours and the normal work day shall consist of eight (8) hours. This shall not be construed as a guarantee of forty (40) hours of work in a normal work week or eight (8) hours of work in a normal day, nor as a limit on the Company's right to schedule work in execess of the normal work week or normal work day. Normal work schedules are as follows:

Three (3) eight (8) hours shifts	7:00 a.m. - 3:00 p.m.
	3:00 p.m. - 11:00 p.m.
	11:00 p.m. - 7:00 a.m.
Two (2) eight (8) hours shifts	6:45 a.m. - 3:15 p.m.
	3:45 p.m. - 12:15 a.m.
Two (2) nine (9) hours shifts	6:00 a.m. - 3:30 p.m.
	4:00 p.m. - 1:30 a.m.
Two (2) ten (10) hours shifts	6:00 a.m. - 4:30 p.m.
	5:00 p.m. - 3:30 a.m.

With the following exceptions:

1) The Central Paint Department will be scheduled to start one hour before the regular shift.

2) The paint set-up man and the maintenance man required to light the ovens, washers, etc., will be scheduled to start one and one-half hours prior to the regular shift.

3) The WIP expeditor will be scheduled to start one (1) hour prior to the regular shift.

Any change in the above schedule will require concurrence of the Union Bargaining Committee. This section defines the normal hours of work and provides the basis for calculating overtime. It shall not be construed as a guarantee of hours of work per day or per week.

Section 2. Time and one-half will be paid for all hours worked on Saturdays and all hours worked in execess of eight (8) hours per day in any continuous twenty-four (24) hours beginning at the time the employee actually starts to work.

Time and one-half will be paid for all hours worked in excess of forty (40) hours in any work week, but no employee shall be paid both daily and weekly overtime for the same hours worked, and nothing in this Contract shall be construed to require or permit the pyramiding of premium or overtime.

All work performed on Sunday or on holidays recognized in this Agreement shall be paid at the rate of double time plus holiday pay except the first hour on Sundays or holiday for a scheduled third shift.

Section 3. Overtime.

Overtime shall be computed on the basis of the rate of the job, during the overtime worked.

(A) The Company reserves the right to require employees in an assembly department to work overtime as follows:

(1) Employees may be required to work during the normal work week and Saturday only. Mandatory O.T. will be scheduled by the week and start at the beginning of the week only.

(2) Employees will be given advance notice of at least two (2) working days prior to required overtime days.

(3) Required overtime days will not exceed:

Twenty (20) working days plus four (4) Saturdays in the six (6) month period from May 1 to the end of October.

Twenty (20) working days plus four Saturdays in the six (6) month period from November 1 through the end of April.

(4) Required overtime shall not exceed two (2) hours per day and ten (10) hours on Saturday.

(5) Probationary employees will be used only.

(1) If the employee has been on the line five (5) days.

(2) Will be used during a temporary work interruption and/or a departmental lay off as described in this Agreement.

(6) Probationary employees will not work if a reduction in work force occurs other than temporary.

(B) Any overtime during the regular work week shall be worked by the man on the job and shift. Any additional or substitute personnel shall be provided from:

(1) The most senior employee within the respective department and classification with the ability to perform the work.

(2) The employee from the respective classification in accordance with their seniority and provided they have the ability to perform the work.

(3) Then plant-wide seniority shall apply provided the employee has the ability to perform the work.

(4) The Steward will be notified of all employees working O.T. in his department.

(C) Saturday work shall be advertised on the plant bulletin board. Anyone wishing to work Saturday must sign the notice posted. Employees shall be selected from the signed notices in the following manner:

(1) The bid man on the job.

(2) In the absence of the bid man or on a non bid job the employee who has worked the job both Thursday and Friday prior to the Saturday overtime.

(3) The bid employee within the respective department with that classification.

(4) The respective classification according to seniority.

(5) In non-incentive classification if less than two hours of work exists, a man's bid job may be combined with a similar bid job.

(6) Then plant-wide seniority shall apply. In the event an employee, after accepting a Saturday assignment, does not report for work he shall be passed by for his next Saturday assignment. All non-union members shall be exempt from working overtime.

(a) 1st shift will be posted before 12:00 noon Friday and taken down at 2:30 p.m.

(b) 2nd shift will be posted before 8:30 p.m. Friday and taken down at 11:00 p.m.

(c) 3rd shift will be posted Thursday before 4:00 a.m. and taken down at 6:00 a.m.

Section 4. Bereavement.

Bereavement pay for three (3) days at the employee's average hourly rate will be paid for death in the employee's immediate family and in the spouse's immediate family (mother, father, sister, brother, grandparents, and children of employee and mother, father, sister, brother and grandparents of spouse). There shall be no pyramiding of wages as a result of the bereavement clause.

Section 5. Any employee reporting for work shall receive at least four (4) hours pay at his guaranteed rate, unless notified not to report. If the Company is unable to contact the employee because of incorrect address and/or telephone number listed in the Personnel Office, they shall not be held liable for any of the four (4) hours pay.

Section 6. Call Ins.

(A) In the event of call-ins, the bid man on the job, then the senior employee in that department and on that shift shall be offered the work.

(B) If an employee is called in to work after having worked a regular shift that day or is called into work on a Saturday, he will be required to work at least four (4) hours in order to receive the four (4) hours pay at time and one-half.

(C) If an employee is called in on Sunday or holiday, which is recognized as such under this Agreement, he will be required to work at least four (4) hours in order to receive the four (4) hours pay at double time plus holiday pay.

(D) If an employee elects to leave before completing the four (4) hour work requirement covered in Sections b and c above, he shall be paid only for the time so worked. It is understood that the meaning of this section is that an employee when called in according to the provisions of Article IX will work the required four (4) hours, provided such work is assigned to him. In the event sufficient work is not supplied to him to cover the four (4) hours he will be paid as though he had worked the entire time.

(E) All Sunday work will be handled by the above call-in provision.

Section 7. If an employee is fifteen (15) minutes or more late, he will not be allowed to enter the plant. Due to extreme weather conditions the Company will extend the time.

Section 8. A rest period of ten (10) minutes duration will be provided approximately in the middle of each half shift. A period of five (5) minutes will be provided prior to the noon break and a period of five (5) minutes will be provided prior to the end of each shift for washup. An unpaid lunch period of thirty (30) minutes on a two-shift operation and a paid lunch of twenty (20) minutes on a three shift operation will be granted approximately midway through the shift. During paid lunch periods employees may not leave the company premises.

ARTICLE X

Production Standards

Section 1. The Company reserves the right to develop through appropriate means, reasonable production performance standards through methods of its selection, such as, master standard data, methods time measurement, time study analysis or other industrial engineering techniques. Time standards shall be set in accordance with accepted

time study engineering practices so that the employees who perform at incentive work make more provided pace and quality standards are maintained. It is mutually recognized by the parties that the Company is entitled to fair day's work for a fair day's pay.

Section 2. The Company agrees that in establishing rates of production it will make studies on the basis of fairness and equity consistent with good quality and workmanship efficiency of operation and reasonable working capacities of normal operators. The Union agrees that its members will cooperate in making time studies. When a model is changed, or new rate is required, Industrial Engineering will release a estimated standard within one (1) working day for individual incentive and five (5) working days for group assembly. After the job has been operating a reasonable amount of time, not to exceed 80 production hours, during which time the methods and work place layout can be optimized, and the time study completed. A permanent standard will be published within five (5) working days after the time study is complete. After a rate is in effect, the operator must make a sincere effort to achieve incentive rate.

Section 3. When an employee or group of employees feel that a standard as established by or changed by the Company is in error, he or they shall have the right to request a re-timing in which case all of the steps of the following procedure shall be exhausted if necessary to satisfy their request providing such request be made within seven (7) working days after the permanent standard has been released on that operation or model. The above time limit may be waived by mutual agreement between management and the Union Bargaining Committee.

Step 1. The operator shall request the foreman for a re-timing. The foreman shall record the request on forms provided and forward it to the Industrial Engineering Department after giving a copy to the Steward of that depart-

ment. The Industrial Engineering Department shall restudy the operation involved as quickly as possible and if a time study engineer is not readily available, the operator will be informed as to when he may expect compliance with this request. If the re-timing by Industrial Engineering proves the standard to be in error, it shall be adjusted accordingly and a copy of the new standard shall be given to the Steward.

Step 2. If after a fair trial of at least one (1) production run but not to exceed eight (8) hours the operator still believes the standard to be in error, the operator shall request the foreman to place the standard in dispute. The foreman shall record the request on forms provided and forward it to the Industrial Engineering Department after giving a copy to the Steward.

Step 3. It shall be compulsory for the Industrial Engineering Department to notify in writing the President of the Union that the Standard has been contested. It shall be compulsory for the Union to request their time study engineer who will be accompanied by a committeeman in order that he may check the standard involved and consult with the Industrial Engineering Department. If, as a result of this consultation, it is mutually agreed that the standard is either correct or is to be adjusted, the operator will be notified and his request will be considered satisfied. A copy of this notification will be given to the Steward.

Section 4. It is understood that work will continue at all time throughout all of the steps of the above procedure and the operators will put forth their best effort at the production standard established by the Company.

Section 5. It is agreed that work element times established by the Company on or after the date of this Agreement and all work element times affected by the above procedure shall remain in effect so long as the existing methods of performing the operation remain the same.

Section 6. It shall be the policy of the Company to give priority to retiming requests.

Section 7. The Company shall have the right to restudy or re-time any job when changes in material, design, or production, tool or tools, equipment, work place layout, method, or sequences of operations have been made. However, whenever any of the said changes affects part of a job, the Company may restudy only the affected elements unless, such changes would affect the other preceding elements and the other succeeding elements. In this case, it may restudy any such elements and consider the results of such studies of the changed element and the ones preceeding and succeeding as part of the standard.

Section 8. Rates of Production — Assembly

After establishing work elements in accordance with this Agreement the following procedures will be utilized to establish assembly dates of production:

(a) Group assembly shall be allowed to make up to 150%.

(b) The Company shall determine the speed of an assembly line based on the quality of the work being performed. The line will start at the speed the line was running the prior day.

(c) The line will be paid for acceptable quality units as follows:

(1) Units which are on the floor at the end of the week due to operator responsibility, will be paid for when boxed.

(2) The Foreman and line Steward will determine who is responsible for all units on the floor by the end of the shift.

(3) The Company's determination of acceptable quality shall be final.

(4) All delays in the form of holes in the line due to lack of quality materials delivered on the line will be paid for as if there were a unit there.

(5) When the line is shut off due to company responsibility the rate of pay will be the rate the line is running when shut off until people are reassigned.

(6) Any incomplete units caused by the company's decision to run an assembly line with a missing or defective part or parts, will be either picked up or included in the earnings as though they were picked up by the end of the week and applied to the rate for that week.

(7) The Company will add a new classification which will consist of six (6) men who will be called special assemblers. They will be used on Line 1, 2, and 3 to fill in for absent employees only. These employees will be guaranteed 125% minimum and must be familiar with all work stations in Line 1, 2, and 3.

(d) The line will have one bid repairman who will not be figured in the standard. Extra repairmen may be added at management's discretion on either a temporary or a permanent basis. When there is no repair work repairmen will be assigned work as directed by the Foreman. Their rate of pay will be the same as line earnings. It is expected that the repairmen will put forth incentive effort.

(e) There may also be one (1) or more bid salvage men on second and third shift for the purpose of repairing and boxing unts. This does not mean one man per line.

(f) If the line must be slowed to day rate or below for reasons other than poor quality caused by assembly line employees the line will be paid at day rate for the time that

the line is running below day rate. When the line is slowed, the foreman will notify the line steward why the slow-down and if line workers are responsible. If employees on the line are responsible for the poor quality they may be disqualified and/or replaced to assure top earning potential.

(g) It will be the line foreman's responsibility to stop and start the line.

(h) There will be a job content available for each model for the Steward and Chairman of the Bargaining Committee.

(i) At management's discretion an assembly assistant from the unit may be temporarily or permanently added to an assembly line. The assembly assistant will work under the direction of the foreman and their activities shall include the instruction of employees repair work when instruction is not necessary and other work assigned by the Foreman. Assembly assistants will be paid 150%. Management will have the right to select assembly assistants provided the employee is not a union official.

Section 9. Individual Incentive Department Rates of Production

(a) There will be a 150% ceiling on individual incentive earnings.

(b) Pay will be based on good pieces produced during the normal working hours. Bad pieces will be subtracted from incentive earnings. The Company's determination of acceptable quality shall be final.

(c) All individual incentive employees are to produce at a minimum of 100% each day or be subject to disqualification.

(d) Pay will be computed daily with a maximum of 150% per day and averaged for the week.

Section 10. New Product Startups — Assembly

The following procedure will apply when new products or product modifications are started up on a production basis.

(a) The Industrial Engineering Department shall provide an estimated production rate. Line employees shall make every effort to meet or exceed the estimated rate.

(b) The Company will complete the time study on the line when, in its judgement, but not exceed eighty (80) production hours, the operators have had sufficient training and practice opportunity to perform their assigned tasks efficiently. The time studies will be completed within the eighty (80) production hours. Within a five (5) day period after all time studies are complete a permanent rate or standard will be published. Line employees will make every effort to meet or exceed the rate, or standard.

Section 11. A Pilot run is a run of new or modified model of 1000 units or less. For a Pilot run the Foreman will determine the number of people required and select these people by seniority and ability. The balance of the line people will be reassigned within the provision of this contract. During this run the employees shall perform all duties assigned by the Foreman. If in the opinion of the Foreman, an employee does not put forth an effort equal to his rate of pay the Foreman will so notify the Steward and replace the employee. The rate of pay for a pilot run is thirty cents (30¢) per hour over base rate.

ARTICLE XI

Wages

Section 1. Written wage rates and classifications are listed in Appendix "A" and hereby made a part of this Agreement.

Section 2. The Company agrees to pay not less than the guaranteed rate for all incentive work.

Section 3. All workers shall receive an additional ten (10) cents per hours for the second shift and ten (10) cents per hour for the third shift.

ARTICLE XII

Holiday Pay

Section 1. In the first contract year, hourly rated employees shall be paid for New Years Day, Good Friday, Memorial Day, Fourth of July, Labor Day, Thanksgiving Day, day after Thanksgiving day before Christmas, Christmas Day, and the day before New Years, plus two floating holidays, for the first and second year one additional floating holiday will be added to complete the week between Christmas and New Years. Pay for the above holidays will be granted providing employees meet all the following eligibility rules unless otherwise provided herein:

(a) The employee has seniority as of the date of the holiday, and

(b) The employee would otherwise have been scheduled to work on such day if it had not been observed as a holiday, and

(c) The employee must have worked the last scheduled work day prior to and the next scheduled work day after such holiday within the work week.

Section 2. When a holiday falls on Sunday, and the day following is observed as the holiday by the State or Federal Government, it shall be paid as such holiday.

Section 3. When one or more of the above holidays fall within an eligible employee's approved vacation period, he shall be paid for such holiday or holidays.

Section 4. When one or more of the above holidays fall within an eligible employee's approved leave of absence of not to exceed thirty (30) days, and he returns to work after the holiday, but within the limit of his leave, he shall be eligible for that holiday or holidays.

Section 5. Employees eligible under these provisions shall receive eight (8) hours pay for each of the holidays specified in Section 1, computed at their regular straight time hourly rate, exclusive of the night shift and overtime premium. In the case of incentive workers, the employee's average hourly earnings exclusive of night shift and overtime premium for the week in which the holiday falls shall be used.

Section 6. Employees who have accepted holiday work assignments and they fail to report for and perform such work without reasonable cause shall not receive holiday pay.

Section 7. Employees with the necessary seniority who have been laid off in a reduction of force, or who have gone on sick leave, or on leave of absence for military service, during the work prior to or during the week in which the holiday falls, shall receive pay for such holiday.

Section 8. When a holiday falls on Saturday, Friday will be observed as a holiday.

HOLIDAY PROPOSALS
DURING CHRISTMAS

—1974—

Sun	Mon.	Tues.	Wed.	Thurs.	Fri.	Sat.	
22	23	24 Xmas Eve	25 Xmas	26 Floating	27 Floating	28	
29	30 Floating	31 New Years Eve	1 New Years	2	3	4	

—1975—

Sun	Mon.	Tues.	Wed.	Thurs.	Fri.	Sat.	
21	22	23	24 Xmas Eve	25 Xmas	26 Floating	27	
28	29 Floating	30 Floating	31 New Years Eve	1 New Years	2	3	

—1976—

Sun	Mon.	Tues.	Wed.	Thurs.	Fri.	Sat.	
19	20	21	22	23	24 Xmas Eve	25	
26	27 Xmas	28 Floating	29 Floating	30 New Years	31 New Years Eve	1	

ARTICLE XIII

Vacation

Section 1. The Company agrees to pay hourly rated employees who are on the seniority list and who have one or more years seniority as of June 30, a vacation bonus based upon all monies earned from the Company during the prior calendar year.

Section 2. The schedule for computing vacation payment is as follows:

5% — 1 to 5 years
8% — 5 to 10 years
9% — 10 to 20 years
10% — Over 20 years

Section 3. The vacation bonus will be paid just prior to the inventory period but not later than July 1.

Section 4. Everyone must have worked 1600 or more hours during the prior calendar year to take vacations. The length of his vacation will be in line with years of employment.

1 to 5 years - 1 Week minimum, 2 weeks maximum
2 to 10 years - 1 Week minimum, 3 weeks maximum
10 and over - 2 weeks minimum, 4 weeks maximum

Section 5. An employee who retires prior to June 30 of any vacation year will receive partial vacation pay based on the closest month of active service. Partial vacation pay will be paid to the estate of an employee who dies prior to June 30 on this same basis.

Section 6. Vacation period will be from January 1 to January 1. Begin vacation at end of work week and end vacation at start of work week.

Section 7. Mandatory retirement age will be 65 years of age.

Section 8. Vacation request and approval of these requests will be in writing on forms supplied. Two weeks notice will be given prior to vacations, unless there are extenuating circumstances.

ARTICLE XIV

General Working Conditions

Section 1. No shut-down or curtailment in production because of loss in volume, lack of sales or shortage of material, shall be deemed a lockout within the meaning of this Agreement.

Section 2. Pay day shall be every Friday. As a convenience to the second and third shifts, an attempt will be made to have their checks available at the end of the shift Thursday, providing absenteeism does not increase. Individual shift abuse will result in checks being made available only on Friday.

Section 3. In all cases in which an employee elects to take an alternate job because of lack of work, the rate of the job shall govern the rate of pay.

Section 4. Foremen shall act in a supervisory capacity and will not perform work unless it is necessary to instruct employees.

Section 5. Neither the Company nor the Union, in carrying out their obligations under this Agreement, shall discriminate against any employee because of race, color, sex, nationality and political or religious affiliation.

Section 6. The Union shall have access to a Union Bulletin Board on the Company premises for the purpose of informing its members regarding Union meeting, election, social and recreational activities. All other matters shall be submitted to the Company for approval.

Section 7. It is agreed that the regular monthly Union meeting may be held between shifts on one day of each month. The Union will notify the Company fourteen (14) days in advance of the date of the meeting. On the day of the meeting, the first shift will terminate (1) hour early and the second shift will begin one (1) hour late.

Section 8. It shall be the responsibility of the employees to notify the Personnel Department in writing of his correct address and phone number.

Section 9. Should the Company choose to reduce hours in lieu of a lay-off, such reduced hour shall require Union Bargaining Committee concurrence.

ARTICLE XV

Improvement Factor and Cost of Living

Section 1. The cost of living allowances are to be applied to the clock card hour in all cases.

Section 2. The cost of living allowances will be 21 cents per hour effective June 1, 1975 and 21 cents per hour June 1, 1976.

ARTICLE XVI

Supplemental Unemployment Benefits

Section 1. Provision for the new Supplemental Unemployment plan have been agreed upon commencing August 19, 1974. The General Motors Supplemental Unemployment benefits plan, dated November 11, 1970 has been adopted as follows:

(a) Yard-Man, Inc., Jackson Operation, will contribute to the Supplemental Unemployment Benefit Plan as required by the Plan but not to exceed ten cents ($.10) for each hour worked.

(b) For lay-offs commencing on or after June 1, 1974, the Company's portion of the insurance expenses

will be paid during lay-off out of the S.U.B. Fund based on one (1) month coverage for each four (4) weeks of S.U.B. Benefits to which his credit units would entitle him to a maximum of twelve (12) months of coverage.

(c) No benefits would be paid for the short work week for the last week of a model year for each department and not to exceed once per year for each employee.

(d) Weekly benefits will be limited to $40 per week for laid off employees when receipt of Unemployment Security Commission check has been accepted at the Personnel Department.

ARTICLE XVII

Insurance

Section 1. The company agrees to pick up total insurance payments for seniority employees with added benefits effective August 19, 1974. Policy to include provisions for coordination of benefits with other insurance companies. Seniority employees off sick will be covered. In case of an employee laid off, the Company agrees to continue his policy to the end of the calendar month in which he is laid off. Employees with one or more years of seniority will be covered with insurance from the S.U.B. Fund until such time the C.U.C.B. reaches the minimum level. At that time insurance will be made available to employees with one or more years seniority on the first of every month at their cost.

Employees with less than one years seniority will have Company paid insurance to the end of the calendar month in which he is laid off plus the following month. After this time insurance will be made available to seniority employees with less than one year seniority on the first of every month at their cost. The employee must report to the

personnel office in person during the third week of each month and sign a statement indicating he desires the insurance to be continued and that he is unemployed. At any time the laid off employee finds other employment, he shall be dropped from the insurance benefits. The Company retains all insurance dividends.

Section 2. Insurance will be available for new employees the first of the month after thirty (30) days service at their cost.

Section 3. The Company will pick up insurance payment for seniority employees the first of the month after ninety (90) days of service.

Section 4. When the former employee has attained the age of 65 years then:

(1) The Company will provide insurance benefits equal to the active group benefits under Blue Cross-Blue Shield for the former employee and his spouse.

(2) If either retiree or spouse are age 65 they must be enrolled in Part A & B of Medicare.

Group BC-BS coverage will be available to all retirees prior to age 65 but the cost must be borne by the employee until age 65 when he may be enrolled as outlined above.

The retiree will not be required to carry BC-BS prior to age 65 in order to receive paid insurance when the retiree attains age 65.

The retiree's age (not spouse's) will determine whether the Company or retiree is to bear the cost of the insurance.

In the event of death of the retiree who is age 65, the Company will continue to insure the surviving spouse and dependent children of the retiree until 6/1/77.

Insurance benefits are as follows:

Life Insurance - $8,000.00 (Retirees $2,000.00).

Accident and Sickness - $90.00 per week (Retirees - None)
1st day accident, 1st day hospital, 8th day sickness for a maximum of 52 weeks.

Hospital and Surgical - Blue Cross-Blue Shield MVF - 2 benefits (Retirees same benefit level).

Any employee who is ineligible for company paid insurance has the option of paying these premiums on an individual basis up to a total of twelve (12) months coverage.

ARTICLE XVIII

Pension

Section 1. With respect to the Jackson Operation Employee's Improved Pension Plan, the Company agrees that in the event of bankruptcy, insolvency, receivership, dissolution, or other such business failure, the Company will at such time, and in such event, fund the balance of the pension benefit payable to employees then on retirement through the purchase of an annuity from a life insurance company. Further, with respect to such plan, the Company agree that there shall be two hourly rate employees on the administrative committee appointed to carry out the general administration of the plan.

Section 2. Reference to pension benefits.

A. Effective June 1, 1973 there was a total of $4.00 per month for each year of service retroactive to July 1, 1951.

B. Effective June 1, 1972 a vesting benefit was added which will apply to all uninterrupted service worked in excess of ten (10) years after July 1, 1951.

Section 3. Improvement in pensions for present employees, past retires and disability will be in letter to follow.

ARTICLE XIX

Savings Plan

The savings plan and pension plan program as set forth in the savings plan handbook will continue for the duration of the contract.

ARTICLE XX

Jury Duty

Section 1. If an employee who has acquired seniority is required to serve on the jury during the regular hours he is scheduled to work, supplemental pay will be granted equal to the difference between the pay received serving as a juror and his average hourly earnings for a maximum of eight (8) hours for any one (1) day.

Section 2. The day on which the employee is summoned and reports for possible jury duty, whether or not selected, shall be considered a day of jury service.

Section 3. An employee must notify his Foreman of pending jury service on the day after he received his notice to be eligible for jury duty pay.

Section 4. If an employee is excused from jury duty on any day, he must report to work within a reasonable length of time after being excused and work the balance of that day.

Section 5. An employee in order to be eligible for pay under this Article must furnish a statement signed by the clerk of the court as to the amount of pay received and the days served as a juror.

Section 6. Jury duty supplemental pay shall be limited to not more than thirty (30) days in any one year measured from the first day he last served.

ARTICLE XXI

Waiver

The parties acknowledge that during the negotiations which results in this Agreement, each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter not removed by law from the area of collective bargaining, and that the understanding and agreements arrived at by the parties after the exercise of that right and opportunity are set forth in this agreement. Therefore, the Company and the Union, for the life of this Agreement, each voluntarily and unqualifiedly waives the right, and each agrees that the other shall not be obligated, to bargain collectively with respect to any subject or matter referred to, covered in this Agreement, or with respect to any subject or matter not specifically referred to or covered in this Agreement, even though such subjects or matter may not have been within the knowledge or contemplation of either or both of the parties at the time that they negotiated or signed this Agreement.

DURATION

This Agreement shall remain in force until June 1, 1977, and thereafter for successive periods of one year unless either party shall, on or before the 60th day prior to expiration, serve written notice on the other party of a desire to terminate, modify, alter, renegotiate, change or amend this Agreement. A notice of desire to to modify, alter, amend, renegotiate, or change, or any comvination thereof, shall have the effect of terminating the entire Agreement (on the expiration date) in the same manner as a notice of desire to terminate unless before the date all subjects of amendment proposed by either party have been

disposed of by agreement or by withdrawal by the party proposing amendment.

In Witness Whereof, the parties hereto have caused this Agreement to be executed and signed by the duly authorized representatives.

YARD-MAN, INC., JACKSON OPERATION

L. E. Shultz

Arthur Leggett

INTERNATION UNION, UNITED AUTOMOBILE, AEROSPACE, AIRCRAFT, AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW AND ITS LOCAL NO. 134

Lawrence Cross

Richard DeVoe

Andy Bailey

John Miller

Michael LaRocque

INTERNATIONAL REPRESENTATIVES

Orin Converse

Don Ellis

APPENDIX A

Plant Rates

	START	6 MOS.
Tool Maker	$2.90	$3.25
Die Repair	2.45	2.95
General Maintenance (Journeyman)	2.60	3.25
General Maintenance A	2.50	3.00
General Maintenance B	2.40	2.80
General Maintenance C	2.30	2.70
General Maintenance D	2.20	2.30
Automatic Setup & Operate	2.60	2.95
Set-Up	2.45	2.95
Layout Inspection	2.45	2.90
Inspection	2.45	2.80
Model Maker (Journeyman)	2.65	3.25
Model Maker	2.65	3.25
Experimental Mechanic	2.60	2.80
Salvage	2.30	2.60
Oiler	2.40	2.60
Crib Attendant	2.40	2.60
Mechanic	2.60	2.80
General Service Parts	2.25	2.45
Shipping - Receiving	2.25	2.45
Stock Chaser - Expeditor	2.25	2.45
Painter	2.25	2.70
Paint Helper	2.25	2.60
Incentive Base Rate	2.15	
Guaranteed Rate	2.15	
Day Rate - Special Assignment	2.15	2.45
Truck Mechanic	2.60	2.95
Warehouse Rework (Bid)	2.30	2.60
WIP Expeditor	2.25	2.75
Sweeper	2.15	
Incentive Ceiling	150%	
Assembly Assistant	150%	
Special Assemblers	125%	

Starting rate non-skilled $2.15; thirty (30) days $2.97; sixty (60) days $3.79; ninety (90) days $2.15 plus full package.

Operator Set-up - ten cents ($.10) above rate.

*$.10 above rate for postal clerk.

ADD ON:

Clock Card	.25
1959 AIF	.06
1961 AIF	.02
1963 AIF	.08 Skilled
Non-skilled	.07
1966 AIF	.03
1967 AIF	.05
1968 AIF	.16
1969 AIF	.09
1970 AIF	.09
1971 AIF	.26
1972 AIF	.10
1973 AIF	.10
1974 AIF	.40

The current cost of living as of June 1, 1974 is $.79/hr.

SUPPLEMENTAL AGREEMENT "A"

Understanding regarding the operation of the retail outlet and service shop located at 440 East Prospect Street, Yard-Man, Inc., and the International Union, United Automobile, Aerospace, Aircraft, and Agricultural Implement Workers of America (UAW) and its Local No. 134 dated August 19, 1974.

The major Agreement between Yard-Man, Inc., Jackson Operation and International Union, United Automobile, Aerospace, Aircraft, and Agricultural Implement Workers

of America (UAW) and its Local No. 134 shall apply plus the following agreements.

ARTICLE 1

To qualify for classification of mechanic the employee must be fully qualified and furnish his own kit of hand tools as deemed necessary by the Company.

ARTICLE 2

A sixty (60) day exemption to provide protected seniority rights is hereby established for the classification of mechanic.

ARTICLE 3

The supervisor of the repair operation shall be a working foreman not for the purpose of elimination an hourly employee but by the nature of the work to analyze the problem and determine what is necessary to effect the needed repair.

ARTICLE 4

All other conditions of the parent agreement dated August 19, 1974 shall apply.

ARTICLE 5

The regular work week and hours are hereby amended for the retail outlet. This being a six-day operation, the schedule will be arranged so as to conform to area retail business practices. It being established that employees shall work a 40 hour workweek and should an employee be scheduled for Saturday work he may not be scheduled to

work the following Monday. Saturday work will be paid at contractual rate of time and one-half.

ARTICLES 6

Guidelines for work at the Factory Branch are as follows:

Sales helper may:

(1) Load and unload mowers for customers.

(2) Assemble mowers for display and customers. The assembly consists of handles, steering wheels, etc. May also gas and oil mowers.

(3) Sell mowers and small parts and move display units in and out of the building.

Sales helper may not:

(1) Work more hours than available to Union members.

(2) Work after a Union member is sent back to the main plant.

(3) Make any engine adjustments, such as tune-up, change spark plugs, carburetor adjustments, battery work or any major repair work.

At least one mechanic will be on hand when the retail store is open for repair work.

The preceding are just guidelines and any variable changes may be agreed upon by the Steward and Management.

YARD-MAN, INC., JACKSON OPERATION
L. E. Shultz
Arthur Leggett

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE, AIRCRAFT, AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW AND ITS

Local No. 134	International
Lawrence Cross	Representatives:
Richard DeVoe	Orin Converse
Andy Bailey	Don Ellis
John Miller	
Michael LaRocque	

SUPPLEMENTAL AGREEMENT "B"

ARTICLE 1

To qualify for classification of model maker the employee must be fully qualified to perform efficiently in 80% of all phases of work in the Model Shop. The phases being as follows: lathe, drill press, shaper, milling machine, arc welding, gas welding, sheet metal working, finishing, tube bending and efficiently use and own hand tools necessary in the Experimental Department.

ARTICLE 2

A sixty (60) day exemption to provide protected seniority rights is hereby established for all bid Model Shop employees.

ARTICLE 3

The Supervisor of the Experimental Department shall be allowed to do work deemed necessary by the Company.

ARTICLE 4

Only authorized personnel will be allowed in the Experimental Department.

ARTICLE 5

Hours of work shall be from 8:00 A.M. to 4:30 P.M. unless otherwise agreed to.

ARTICLE 6

The Company may hire additional skilled people who would not be figured in the Bargaining Unit as long as their skills exceed those of the employees in the Bargaining Unit.

ARTICLE 7

All other conditions of the parent agreement dated August 19, 1974 shall apply.

YARD-MAN, INC., JACKSON, OPERATION
L. E. Shultz
Arthur Leggett

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE, AIRCRAFT, AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW AND ITS

Local No. 134
Lawrence Cross
Richard DeVoe
Andy Bailey
John Miller
Michael LaRocque

International Representatives:
Orin Converse
Don Ellis

SUPPLEMENTAL AGREEMENT "C"

Supplement C to Agreement dated August 19, 1974 between Yard-Man Incorporated and the International Union, United Automobile, Aerospace, Aircraft and Agricultural Implement Workers of America, UAW, and its Local No. 134 Agreement covering semi-truck drivers.

ARTICLE I

OVER THE ROAD OR LONG HAUL SEMI-TRUCK DRIVER

It is understood the truck driver for over-the-road operations job will be subject to the prime contractual provision with the following oprions.

Section 1. Employee must be fully qualified for all types of tractors including multi-speed diesels, satisfy physical and licensing requirements and have knowledge of Interstate Commerce Commission Regulations. The qualifications are to be determined by the company. The equipment lessor has the right to approve or reject any or all drivers.

(a) The driver shall be responsible for all moving violations, the safety and welfare of his load and of the equipment. He will be responsible for compliance with all pertinent rules and regulations.

(b) In case it is necessary, bail for the driver will be furnished by the company.

(c) Must have valid chauffeurs license.

Section II Scale of pay for "Road Driver":

(a) 12¢ per mile plus $5.00 for each stop (pick up or delivery) when the driver stays with the vehicle on round trips over 150 miles.

(b) $2.00 for hook up, disconnect and fueling on the road.

(c) On "round trips" less than 150 miles — hourly rate of $2.95 per hour will be paid.

(d) Waiting time on "round trips" less than 150 miles will be standard hourly rate. Waiting time on round trips of more than 150 miles will be paid at the $2.95 per hour rate after the first two (2) hours of waiting.

(e) Meals not paid for by company unless driver runs out of hours and has to "lay-over." Lodging not paid for by company, unless driver has to lay-over per company authorization.

(f) One hour at base rate will be allowed for fueling if necessary at the beginning of a trip.

Must fully qualify with all Department of Transportation requirements. All other conditions of the parent agreement dated August 19, 1974 shall apply.

YARD-MAN, INC., JACKSON OPERATION
L. E. Shultz
Arthur Leggett

INTERNATIONAL UNION, UNITED AUTOMOBILE AEROSPACE, AIRCRAFT, AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW AND ITS

Local No. 134
Lawrence Cross
Richard DeVoe
Andy Bailey
John Miller
Michael LaRocque

International Representatives:
Orin Converse
Don Ellis

GENERAL INFORMATION

THE JOB FROM YOUR OWN STANDPOINT

There are two parts to the subject of your job:

1. The things we expect from you.
2. The things you can expect from us.

Naturally, the most important to you is the second one. Insofar as the first one is concerned, it is sufficient to say that we expect you to be a steady, loyal worker, eager to improve yourself and ready at all times to do your best.

From us you can expect good wages and working conditions, proper training and opportunity.

AS AN EMPLOYEE, IT IS EXPECTED THAT

1. You have the ability to do a given job.
2. You will apply your ability toward achieving teamwork through cooperation with fellow employees.
3. You will progress during employment through self-improvement.

YOUR FOREMAN

In your future with this Company you will find that other individuals will have as much to do with your welfare and progress as your Foreman. Your Foreman and you have an important job to do together. He is the member of Management with whom you will have your principle contact. He is responsible for the operation of the department. He must maintain established standards of quality and see that the quality desired is produced. He is responsible for the discipline in his department.

He will see that you are fully acquainted with the requirements of your job, and that you understand what is expected of you. You will find that your Foreman is well qualified to direct the work for which he is responsible.

His own promotion has been gained because of his knowledge of his work, his ability to lead and instruct others and his willingness to accept supervisor responsibilities. You will find him friendly and encouraging. He will know and appreciate your initial difficulties and will do everything to help you. It probably hasn't been too long since some other Foreman was helping him to get started.

Don't hesitate to go to your Foreman with your problems. He will be glad to discuss them with you. Your department is a team in which cooperation and loyalty are important. Your Foreman is the captain of this team and you will find that he is interested in your welfare and progress.

WORKING CONDITIONS

It is our policy to provide pleasant, safe, sanitary conditions throughout the plant and considerable attention is given to that end. Safety devices have been installed on hazardous equipment and all facilities for personal use are constantly checked.

In addition, you will be supplied with the best tools, machinery, and raw materials available in order to do the best job possible with the least difficulty. Please do your part by handling the tools and equipment as if they were your own and by cooperating in the use of all facilities.

PHYSICAL EXAMINATION

You are required to pass a physical examination to be given by the Company physician. The Company pays for this expense.

Upon return to work from any period of absence, the employee may be required to pass a physical examination to determine his fitness to work.

PARKING LOTS

Parking facilities near the plant are provided for your convenience when you drive to work. In consideration of this privilege, you will be required to comply with the parking regulations, which are as follows:

1. Do not park in assigned spaces.
2. Park properly and give the other fellow the opportunity of parking too.
3. Do not block fire lanes, doorways, and roadways.

BULLETIN BOARDS

Information regarding working hours, safety, Company policies and other matter related to your employment is posted on the buletin board from time to time for your guidance. Make a practice of reading the notices on the board. A posted statement is deemed sufficient notice of change in policies, hours, rules, etc. Only duly authorized representatives of the Company are permitted to post or remove signs, paper, notices, etc., from the bulletin boards or elsewhere in the plant.

CLOCK CARD

The clock card is a record of your hours worked, and is used to compute your pay. Be sure to punch your own card "In" and "Out" as required. The amount of your pay depends on the clock card record. Failure to punch the card may result in disciplinary action.

Remove your card from the rack only to punch "In" and "Out". Do not take it with you. Punching a clock card other than your own may lead to disciplinary action.

Do not fail to punch your clock card upon reporting for and leaving work. If you leave the plant during working hours, you must punch your clock card "Out."

If you are unable to locate your clock card in the rack, notify your Foreman immediately.

TELEPHONE CALLS

Employees cannot be called to the telephone; however, the Personnel Office will take messages in especially urgent cases.

ATTENDANCE

Good attendance will favorably influence your record. Obtain permission from your Foreman in advance when it is necessary for you to be away from work.

It is your duty and obligation to be on the job every day you are scheduled to work, if at all possible, and when for some good reason it is impossible for you to do so, you should notify your Foreman or the Personnel Office immediately.

PAY CHECKS

Wages are paid weekly for work done up to and including the previous Sunday and checks will be issued to you at the end of the shift each Friday or as otherwise provided in the Agreement.

If there is any shortage or error in your pay check, report it at once to your Foreman.

If you lose your pay check, report it at once to the Personnel Office.

If you are absent at the time your check is issued, you can obtain it at the Personnel Office.

ON THE JOB

Employees must be at their places ready to begin work at the start of their shift, and must not make preparations to leave their work until the end of their shifts.

GOOD HOUSEKEEPING

Every employee is expected to practice good housekeeping while in the plant. Orderliness and cleanliness are important factors in preventing injuries, sickness, and fire.

Place dirty rags, food scraps, waste paper and other waste material in the cans which are provided for these purposes.

THE YARD-MAN SAFETY POLICY

I. OBJECTIVE

It is the Company's objective, for the benefit of employees, to prevent loss of life, limb, and property by having all work planned and carried out so safely that accidents will not occur.

II. COMPANY ACCIDENT PREVENTION POLICY

A. The Company recognizes accident prevention as an essential part of every employee's job and expects all work to be carried out in a safe manner in order to prevent injuries either to employees or other persons, damage to property or interruption of service.

B. Accidents are errors which will be considered as a measure of job performance for either an individual or a group.

C. Responsibility and authority for the action necessary to prevent accidents rests with the supervisor as an integral part of his job. Department heads will provide constant leadership and encouragement for preventing accidents to the first level supervisor and through him to the employees.

III. EMPLOYEE'S RESPONSIBILITIES

A. All employees must know, accept and apply the Company's accident prevention policy as a condition of employment. To carry out this policy each employee must:

1. Get and use safe and effective instructions for doing the job from his immediate supervisor.
2. Recognize and respect the hazard encountered.
3. Have confidence in his own ability, not fear of the work.
4. Take pride in safety and safe practices.

5. Be eager to learn.
6. Report every injury immediately, no matter how minor, to his supervisor.
7. Report off-the-job injuries or illnesses which might effect the safety and efficiency of his work.
8. Seek to guard his own life and help others whenever possible.
9. If safety goggles, respirators or other protective equipment is required on the job, it will be available at the tool crib and will be worn.
10. Good housekeeping is an important part of the safety program and must be observed at all times.

IV. SUPERVISOR'S RESPONSIBILITIES

A. Supervisors must know and apply the Company's accident prevention policy. The Supervisor's planning, assigning and control of work should include these specific activities which will help prevent accidents:

1. Instruct the employees before starting a new job on how to perform the operation and give him any specific safety instructions for that particular job.
2. Make sure that all safety devices are adjusted and functioning properly.
3. Enforce the use of safety goggles, respirators or other protective equipment if they are required on the job.
4. Observe work methods and habits continually and take corrective action if necessary before accident occur.
5. When an accident does occur, make a complete investigation of causes and fill out the foreman's accident investigation report.

6. Deliver all accident investigation reports to the Plant Superintendent.

B. All supervisors will be required to attend a safety meeting immediately following the safety committee's monthly inspection tour.

V. MANUFACTURING MANAGER'S RESPONSIBILITIES

A. It is the function of this department to provide general leadership for accident prevention and provide help for the supervisors through training, including the following:

1. Investigate cause of each accident and report corrective action taken to Vice President of Manufacturing.
2. Establish a safety committee consisting of a safety director, supervisors and representatives from the bargaining unit.
3. Hold a monthly meeting with supervisors following the safety committee's inspection tour to analyze inspection reports and accident records.
4. Take action upon safety recommendations coming from any source.
5. Arrange to have fully trained first-aid personnel in attendance on all shifts.

VI. SAFETY DIRECTOR'S RESPONSIBILITIES

A. The Safety Director will coordinate and provide counsel on safety controls and problems.

1. He will head up the safety committee which will make a monthly safety inspection tour of the plant.
2. A written report of the inspection tour will be submitted by the safety director to the plant superintendent with recommendation on all unsafe conditions or acts.

3. He will assist the superintendent in planning accident prevention and see to it that all unsafe conditions are corrected.
4. Accompany outside agencies when a safety inspection tour is made and report on the recommendations made by these agencies.

VII. TOOL CRIB ATTENDANT'S RESPONSIBILITIES

1. Be in charge of the first-aid station and maintain its facilities and supplies.
2. Give emergency treatment on all injuries.
3. Keep accurate records of all treatment given and submit a monthly report of those to the personnel director for future reference.
4. Dispense all personal protective equipment such as safety goggles, respirators, ear plugs, etc.
5. Clean and sterilize all respirators and goggles before reissuing.

VIII. INDUSTRIAL RELATIONS MANAGER'S RESPONSIBILITIES

1. Screen all new employees for placement and make reference and history checks.
2. All applicants and employees who have been laid off from work for six months or more will be given a physical examination by the Company physician. The medical examination forms will be filed in the Personnel Department with an explanation of the Doctor's Coding.
3. Keep adequate accident records to analyze accident trends and causes.
4. Submit to the Vice President of Manufacturing a monthly report covering all accidents and first-aid cases.

GENERAL

1. All outside safety reports should be routed to the Manufacturing Manager who in turn will cover the reports with the Production Manager and the safety committee.
2. The Vice President of Manufacturing will report monthly on safety activities and accidents to the President.
3. Every quarter, the Accounting Department will review with the safety committee the claims filed with our insurance carrier.

SAFETY RULES

GENERAL

Safety signs are for your guidance and protection. Read their warning—avoid injury.

Gloves and sleevelets may be worn only on jobs specified by your Foreman.

The following items of plant equipment are dangerous in untrained hands. Therefore, only persons specifically authorized by supervision to do so, may operate them at any time.

(a) Power trucks of any type.

(b) Cranes and hoists.

(c) Oxyacetylene and other welding equipment.

(d) Woodworking or other machinery.

You are expected to keep any personal tools in first-class condition.

Shut down your machine before leaving it.

Only duly authorized persons are permitted to make electrical repairs.

Report any need for electrical work to your Foreman immediately.

Take no chances with electricity—never attempt to make electrical repairs yourself.

Before working on equipment that has been repaired, check to make sure everything is in proper working order.

Strains and sprains are often caused by improper methods of lifting.

Learn to lift the safe way in order to avoid any possible injury. Bend your knees, keep your back erect and lift gradually with your leg muscles.

Do not over-exert yourself in lifting. Call for assistance when the load is heavy.

Aisles are the transportation avenues of the plant and must be kept clear. Blocked aisles might cause serious consequence in case of emergency.

Using compressed air for blowing off clothing, hair, face or hands is extremely dangerous and is strictly forbidden.

When compressed air is used as part of the operation, constant care must be exercised to avoid injury from flying particles.

Keep the air hose nozzle away from your body or that of other employees.

Never point the nozzle at anyone. The pressure is sufficient to cause death should it enter the body.

Anyone who engages in horseplay in the handling of compressed air will be dismissed.

Good plant housekeeping is the foundation of safety. It means a place for everything and everything in its place. It is the desire of Management to maintain a clean and orderly plant.

Every effort is made to provide sanitary toilets. Your cooperation in keeping them clean will help.

Learn the location and proper use of the fire fighting equipment in your department.

Under no circumstances use a pail of water where fire extinguishers are provided.

NEVER pour gasoline, kerosene, oil or other inflammable liquids into any sewer or drain.

Keep places about you clean and put all oily waste, clothing, rubbish or paper in containers provided for such waste.

Use extreme care in handling all chemicals.

RULES AND REGULATIONS

The following are rules and regulations set forth to protect employees' rights and insure proper management of the plant. The doors will be locked at 7:00 a.m. All employees reporting to work after 7:00 a.m. will not be allowed to work and will not receive any call in provisions or S.U.B. or short work week benefits. Due to bad weather the company may extend the time.

All Rules and Regulations will be set on a point system, with a total of eight (8) points being up to and including discharge.

2 Points	Warning Notice
4 Points	Three Days Off
6 Points	Five Days Off
8 Points	Up to and Including Discharge

DISCIPLINARY ACTION ON VIOLATION OF THE FOLLOWING RULES AND REGULATIONS WILL BE EIGHT (8) POINTS

1. Falsification of personnel, daily time tickets or other records.
2. Possession, display or use of weapons, percussion caps, fireworks, dangerous or disturbing objects in the plant without authorization.
3. Insubordination.
4. Threatening, intimidating, coercing, or interfering with employees or supervision.
5. Misuse or removal from the premises without proper authorization of employee lists bluepurints, company records, or confidential information of any nature.
6. Abuse, misuse, or deliberate destruction of company property, tools, equipment or the property of employees in any manner.
7. The making or publishing of false, vicious or malicious statements concerning any employee, supervisor, the company or its products.
8. Fighting on the premises at any time.
9. Theft or misappropriation of property of employees or of the company.
10. Possession of or use of narcotics, liquor, or any alcholic beverage on company property at any time.
11. Reporting to work in an unfit or unsafe condition.
12. Immoral or indecent conduct.
13. Two Job disqualifications.
14. Leaving the plant during working hours without permission.

DISCIPLINARY ACTION ON VIOLATION OF THE FOLLOWING RULES AND REGULATIONS WILL BE FOUR (4) POINTS

1. Failure to ring own clock card or ringing the clock card of another.
2. Unauthorized disturbing of literature, written or printed matter of any description on company premises.
3. Posting or removal of notices, signs, or writing in any form on bulletin board on company property at any time without specific authority of Management.
4. Working hours other than what has been specified by Management.
5. Two wage assignments or garnishments and each one thereafter.

DISCIPLINARY ACTION ON VIOLATION OF THE FOLLOWING RULES AND REGULATIONS WILL BE TWO (2) POINTS

1. Absence without reasonable cause.
2. Creating or contributing to unsanitary conditions.
3. Making scrap unnecessarily, careless workmanship, or repeated failure to earn incentive standards.
4. Horseplay, scuffling, running or throwing things.
5. Wasting time or loitering in toilets or on company property during working hours.
6. Disregard of safety rules or common safety practices.
7. Throwing refuse or objects on the floor or out of windows.

8. Entering or leaving the plant premises through any area other than designated for that purpose by Management.
9. Leaving the work area or department before the 5 minute washup signal, or break signal.
10. Reporting back to work area or department late from lunch or break periods.
11. Failure to punch out and in when leaving the plant.
12. Being absent over once in a thrity (30) day period.
13. Being tardy over once in a thirty (30) day period.
14. Improper parking.
15. Reading of outside material such as books, magazines, and newspapers on company time.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW) AND LOCAL 134, UAW,
Plaintiffs,

v. Civil No. 7-72408

YARD-MAN, INCORPORATED, a wholly-owned Delaware subsidiary corporation, and MONTGOMERY WARD, INC., an Illinois corporation,
Defendants.

MEMORANDUM OPINION

This is a civil action brought by the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) and its affiliated Local 134, for breach of a collective bargaining agreement by defendant Yard-Man, Inc., a wholly-owned subsidiary corporation of Montgomery Ward, Inc. Jurisdiction is predicated upon Section 301 of the Labor-Management Relations Act, 29 U.S.C. § 185(a). The complaint originally contained seven counts and was addressed against both Yard-Man, Inc. and Montgomery Ward, Inc. By stipulation of the parties, counts three, four, five and seven have been dismissed without prejudice; Yard-Man is the only remaining defendant.

This matter is now before the Court on cross-motions for summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for this Court's determination of the merits of counts one, two and six. As is usually the

case on cross-motions for summary judgment, the parties agree on the basic facts of the case, although they disagree on the conclusions to be drawn from those facts as well as on the application of the general legal principles involved.

The basic problem raised by the motions in this case concerns the interpretation of the last collective bargaining agreement between the UAW and defendant Yard-Man. More specifically, the Court must determine whether former employees of defendant Yard-Man are entitled to receive certain benefits provided under the collective bargaining agreement, despite the cessation of defendant's operations, the closing of defendant's plant and the subsequent termination of the collective bargaining agreement. In count one, plaintiffs seek medical and life insurance benefits for UAW-represented employees who retired before the expiration date of the collective bargaining agreement. In count two, plaintiffs seek specific enforcement of a contract provision for the purchase of pension annuities, or, in the alternative, money damages for breach of the provision. Finally, in count six, plaintiffs seek relief on principles of quantum meruit and unjust enrichment for the value of 1976 vacation pay.

This Court agrees that interpretation of the last collective bargaining agreement between the parties is a central issue in this case and that this issue is a question of law for the Court. A. Corbin, Corbin on Contracts, §532 (one volume ed., 1952); *Green* v. *Valve Corp. of America*, 428 F.2d 342 (7th Cir. 1970). For summary judgment to be granted to either party however, this Court must determine that one of the moving parties is entitled to judgment as a matter of law upon facts that are not genuinely disputed. Rule 56(c), Federal Rules of Civil Procedure; *Begnaud* v. *White*, 170 F.2d 323 (6th Cir. 1948). Upon review of the entire file in this case, the Court finds it must agree with the parties that there exists no genuine issue of material fact in this case, and that summary judgment is therefore appropriate.

The undisputed, material facts in this case are as follows. Defendant Yard-Man, Inc. owned and operated a manufacturing plant in Jackson, Michigan; the UAW was the exclusive collective bargaining representative for all production and maintenance employees and truck drivers employed at that plant. In August of 1974 Yard-Man and the UAW entered into a collective bargaining agreement with a stated expiration date of June 1, 1977.

In July of 1975, Yard-Man announced that it was going out of business for financial reasons and that it would be terminating operations at its plants in Jackson and Sullivan, Illinois. Production operations ceased shortly thereafter, although some employees remained to perform clean-up work until October 3, 1975, when the plant in Jackson was permanently shut down.

After cessation of operations, Yard-Man continued to fund medical and life insurance coverage for Yard-Man retirees. In April of 1977, however, Yard-Man, through Montgomery Ward, advised the retirees that the insurance coverages would terminate or be cancelled as of June 1, 1977. The retirees were offered conversion policies to take the place of their company medical and life insurance coverages. In May of 1977 the UAW filed two grievances, claiming that Yard-Man's action was in breach of Article XVII of the collective bargaining agreement. On June 1, 1977, the company-funded insurance coverages were terminated. The UAW filed this action on October 5, 1977, following the refusal of Yard-Man and Montgomery Ward to submit the grievances to arbitration.[1] The issues centering upon termination of medical and life insurance coverages formed the bases for count one of the complaint.

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[1] In count one of the complaint, the UAW originally sought, in the alternative, an order compelling arbitration of the filed grievances. In view of the fact that Yard-Man in its answer resisted submitting the grievances to arbitration, the UAW agreed to waive any potential rights to compel arbitration and to submit the merits of the dispute for this Court's determination. The same is true with respect to the cause of action alleged in count two of the complaint.

During the time period at issue, UAW-represented employees and retirees at defendant's Jackson plant were covered by two separate pension plans. Following the cessation of operations at the Jackson plant, the primary plan—the Yard-Man Pension Plan-Jackson (Basic Plan)—was submitted to the Pension Benefit Guaranty Corporation (PBGC) in accordance with the plan termination provisions of the Employee Retirement Income Security Act of 1974 (ERISA), 29 USC §1011, *et seq.* On October 21, 1977, the PBGC sent notification that the funding of the Basic Plan would be unable to support the benefits guaranteed by PBGC; the deficit totalled $300,000. Rather than terminate the Plan and allow the PBGC to assume trusteeship, Yard-Man requested quotations from five major insurance companies for an annuity to cover the benefits under the Basic Plan. Three of those five companies agreed to respond with quotations. The lowest bid, submitted by Metropolitan Life Insurance Company, was accepted; the annuity was purchased, effective November 1, 1978, to cover the retirement benefits under the Basic Plan.

The second plan—the Jackson Operation Employees Improved Plan (Improved Plan)—was a non-qualified plan which required no filing with the PBGC. Under the collective bargaining agreement, however, defendant Yard-Man agreed that in the event of business failure, it would fund the balance of the pension benefit payable under the Improved Plan to employees then retired through the purchase of an annuity with a life insurance company. Collective Bargaining Agreement, Art. XVIII.

When it requested bids for an annuity to cover benefits under the Basic Plan, defendant Yard-Man also requested bids for an annuity to cover benefits under the Improved Plan. Of the three responding insurance companies, the New York Life Insurance Company refused to bid on a non-qualified pension plan, the Travelers Insurance Company submitted a bid contingent upon the award of the

annuity for the Basic Plan, and the Metropolitan Life Insurance Company submitted a bid on the assumption that the Improved Plan was a qualified pension plan. Since Yard-Man agreed to accept Metropolitan's bid to cover the Basic Plan and accordingly rejected Travelers' bid to cover the Improved Plan, it distributed a lump sum actuarial equivalent of benefits under the Improved Plan to the Participating retirees.[2] Yard-Man's actions in distributing the lump-sum payments rather than purchasing an annuity to fund the benefits under the Improved Plan formed the basis for count two of plaintiffs' complaint.

When the Jackson plant was closed in 1975, the employees on the seniority list just prior to the shut down received a 1975 vacation bonus based on their 1974 earnings, pursuant to Article XIII of the collective bargaining agreement. When Yard-Man announced its intent to refuse payment of a 1976 vacation bonus based upon the employees' earnings in 1975, the UAW filed a grievance which ultimately was submitted to arbitration. The arbitrator held that as a matter of contract interpretation the employees were not due a vacation bonus based upon their 1975 earnings. Although the UAW originally attacked the arbitrator's decision on its merits, it now has abandoned that claim and instead asserts that the employees are entitled to the vacation bonus under theories of quantum merit and unjust enrichment.

I. Count One

The provision in the collective bargaining agreement under which plaintiffs assert a right to medical and life

[2] The affidavit of Gerard L. Evenwel, Jr. states that Yard-Man used a set of actuarial tables provided by the PBGC to determine the lump sum present values of the Improved Plan Monthly benefits. These tables were chosen over the tables of the Plan's actuary and the tables provided by the Metropolitan Life Insurance Company. The PBGC actuarial tables were based upon an eight percent interest assumption rather than a ten percent interest assumption.

insurance benefits on behalf of defendant's retired employees reads as follows:

> Section IV. When the former employee has attained the age of sixty-five years then:
>
> 1. The Company will provide insurance benefits equal to the active group benefits under Blue Cross - Blue Shield for the former employee and his spouse.
>
> 2. If either retiree or spouse are age sixty-five they must be enrolled in part A and B of Medicare.
>
> Group BC-BS coverage will be available to all retirees prior to age sixty-five but the cost must be borne by the employee until age sixty-five when he may be enrolled as outlined above.
>
> A retiree will not be required to carry BC-BS prior to age sixty-five in order to receive paid insurance when the retiree attains age sixty-five.
>
> The retiree's age (not spouse's) will determine whether the company or retiree is to bear the cost of the insurance.
>
> In the event of death of the retiree who is age sixty-five, the company will continue to insure the surviving spouse and dependent children of the retiree until 6/1/77.
>
> Insurance benefits are as follows:
>
> Life insurance - $8,000 (retirees $2,000).
> Accident and sickness - $90/week (retirees - none) 1st day accident, 1st day hospital, 8th day sickness for a maximum of 52 weeks.
> Hospital and Surgical - Blue Cross - Blue Shield MVF - 2 benefits (Retirees same benefit level).
>
> Any employee who is ineligible for company paid insurance has the option of paying these premiums on an individual basis up to a total of twelve (12) months coverage.

Plaintiffs argue that this provision gave defendant's retired employees a vested contract right to the specified insurance coverages, and that this vested right did not terminate with the closing of the plant or the expiration of the collective bargaining agreement. Plaintiffs assert that defendant therefore breached the collective bargaining agreement when it ceased providing insurance coverages as of June 1, 1977. Defendant contends, however, that under the collective bargaining agreement the retired employees did not have a vested contract right to the insurance coverages for the duration of their retirement and that termination of the coverages on the expiration date of the collective bargaining agreement therefore was proper.

Plaintiffs find support for their vested rights theory in the Supreme Court's decision in *Allied Chemical & Alkali Workers* v. *Pittsburgh Plate Glass*, 404 U.S. 157 (1971). In that case, the Supreme Court held that when a worker retires from employment he is no longer an employee for purposes of the National Labor Relations Act, and therefore the employer is not under a statutory duty to bargain over the subject of retirement benefits. In a footnote, however, the Court stated:

> This does not mean that when a union bargains for retirees—which nothing in this opinion precludes if the employer agrees—the retirees are without protection. Under established contract principles, vested retirement rights may not be altered without the pensioner's consent. See generally Note, 70 Col. L. Rev. 909, 916-920 (1970). The retiree, moreover, would have a federal remedy under § 301 of the Labor Management Relations Act for breach of contract if his benefits were unilaterally changed.

Id. at 181, n. 20. Plaintiffs assert that the footnote reference in *Pittsburgh Plate Glass* supports their position that the medical and life insurance benefits bestowed upon the retired employees in this case cannot be extinguished by termination of the labor agreement, absent the retirees' consent.

It is well settled that rights conferred by a collective bargaining agreement can extend beyond the term of the agreement. As the Supreme Court stated in *John Wiley & Sons* v. *Livingston*, 376 U.S. 543 (1964), "We see no reason why parties could not if they so chose agree to the accrual of rights during the term of an agreement and their realization after the agreement had expired." *Id.* at 555. It is equally well settled that if any right is to survive beyond the duration of the collective bargaining agreement in which it is contained, such survival must rest upon the specific terms of the agreement. *Oddie* v. *Ross Gear & Tool Co.*, 305 F.2d 143 (6th Cir.), *cert. denied*, 371 U.S. 941 (1962). In *UAW* v. *Robertshaw Controls Co.*, 405 F.2d 29 (2d Cir. 1968), for example, the court recognized that "[i]f rights are to exist beyond the term of the collective bargaining agreement, the agreement must so provide or be susceptible of such construction." *Id.* at 33, *citing Zdanek* v. *Glidden Co.*, 288 F.2d 99, 105 (2d Cir.) (Lumbard, C.J., dissenting), *cert. denied on this issue*, 368 U.S. 814 (1961).

Plaintiffs concede that their vested rights theory has vitality only insofar as the collective bargaining agreement itself provides, or can be read to provide, that insurance benefits extend beyond the term of the agreement. Thus, this Court must turn to interpretation of Article XVII, Section IV of the collective bargaining agreement.

Several basic principles of law governing contract interpretation are instructive at this point. First, contractual provisions must be interpreted as a whole rather than in isolation from one another. *Florida Canada Corp.* v. *Union Carbide & Carbon Corp.*, 280 F.2d 193 (6th Cir.), *cert. denied*, 364 U.S. 902 (1960). Second, in the same vein, the dissimilarity of the language used by the parties in different parts of the contract is revealing in ascertaining the parties' intent. *See Upholsterers' Int'l Union* v. *American Pad & Textile Co.*, 372 F.2d 427 (6th Cir. 1967). Third, contractual provisions must be reasonably construed so as to make

none nugatory and the promises contained therein illusory. *Cordovan Assoc., Inc.* v. *Dayton Rubber Co.*, 290 F.2d 858 (6th Cir. 1961).

In the present case, the contract provides that "the Company *will provide* insurance benefits" to the retired employees. (emphasis added). The controversy in this case centers upon the meaning of the terms "will provide." Defendant asserts that the terms are unambiguous and support the position that insurance benefits were intended to terminate with the expiration of the collective bargaining agreement. Plaintiffs, on the other hand, argue essentially that the terms must be supplemented to read "for the term of the former employee's retirement."

Plaintiffs find support for their position in *Upholsters' International Union* v. *American Pad & Textile Co.*, 372 F.2d 427 (6th Cir. 1967). In that case, as in the case at bar, it was argued that certain retired employees of the defendant company were entitled to life-long insurance benefits despite the closing of the company plant and the termination of the collective bargaining agreement. The Sixth Circuit Court of Appeals held that the company was in fact obligated under the terms of the agreement to continue insurance for the retirees until their death. The contract provision at issue read as follows:

> 2. It is further agreed that any employee with 15 years or more of continuous service with The American Pad and Textile Company at the time of retirement and having attained the age of 65 years, the Company will continue to cover such eligible retired employees with $2,000 life insurance.

372 F.2d at 427.

As Yard-Man points out, the court in *American Pad* found the language "the Company will *continue* to cover [the retirees]" to be ambiguous, when read in light of the

whole agreement; however, the language was found to express an intent to provide insurance coverage for the retirees for the duration of their retirement. In the present case, the word "continue" does not appear in the provision at issue. Its absence, however, does not make the provision any less ambiguous. The Court is of the opinion that the intended duration of the insurance coverages must be ascertained by reference to the remainder of the contract. *See Florida Canada Corp.* v. *Union Carbide & Carbon Corp., supra.*

As plaintiffs point out, several contract provisions specifically state the duration of the agreements specified therein. For example, Article XIX provides that the savings and pension plans "will continue for the duration of the contract." Article XXI provides that the bargaining waiver referred to therein is "for the life of this Agreement . . . ." No such limiting language appears in the article governing insurance. The implication is that absent such limiting language, the parties intended the insurance coverages to extend beyond the life of the collective bargaining agreement. *See American Pad, supra.*

Such an interpretation is buttressed by the fact that when the parties intended to extend or limit insurance coverages to a specific time period, they included language to that effect in the contract. For example, in Article XVII, Section 1, insurance coverage for laid-off employees with less than one year seniority is expressly limited to "the end of the calendar month in which [they are] laid off plus the following month." In Section 4 of Article XVII, insurance coverage is extended to the spouses and dependent children of retirees who are age 65 "until 6/1/77."

Furthermore, Section 4 of Article XVII requires Yard-Man to make medical insurance coverage available to all retirees before they reach age 65, although the cost must be borne by the employee "until age 65 when he may be enrolled [at Company expense]." In light of the fact that

under defendant's pension plan an employee can take early retirement after reaching age 55, it is unreasonable to interpret the insurance coverage provision as limited to the duration of the collective bargaining agreement. Such an interpretation would render illusory defendant's promise that an early retiree would receive company-paid insurance coverage upon reaching normal retirement age.

Unfortunately, in interpreting the contract, the Court in this case does not have the benefit of past practice of the parties, as did the Court in *American Pad.* Nevertheless, for the reasons stated above, the Court must conclude that the provision at issue should be read as extending insurance coverage to defendant's retirees for the duration of their retirement rather than for the duration of the collective bargaining agreement. The Court therefore finds that defendant Yard-Man breached the collective bargaining agreement when it cancelled medical and life insurance coverages as of June 1, 1977.

The Court notes that the retirement cut-off date which plaintiffs propose in this case is June 1, 1977—the expiration date of the collective bargaining agreement. Since retirement presupposes the termination of an *existing* employer-employee relationship, and depends upon whether the employee at the time of retirement has a sufficient credited period of service, the Court must reject plaintiffs' proposed cut-off date. Under Sixth Circuit precedent, it appears to this Court that relief must be limited to those employees who actually retired prior to the 1975 plant closing and the cessation of business operations. *See Schneider* v. *Electric Auto-Lite Co.*, 456 F.2d 366, 373 (6th Cir. 1972); *Fraser* v. *Magic Chef Food*, 324 F.2d 853 856 (6th Cir. 1963).

Finally, plaintiffs have outlined extensive proposals for the granting of relief in this case, and have suggested the appointment of a special master under Rule 53 of the

Federal Rules of Civil Procedure. Defendant, however, has requested that the formulation of any remedial plan await this Court's decision on the merits. Since the Court is of the opinion that the parties have not adequately addressed the issues regarding appropriate relief and the appointment of a special master, the Court will defer its decision on these matters until the parties have had the opportunity to file supplemental briefs and, if they so desire, to present additional oral arguments to this Court.

II. Count Two

In count two of the complaint, plaintiffs seek specific enforcement of a contract provision for the purchase of annuities to cover defendant's Improved Pension Plan; in the alternative, plaintiffs seek a monetary judgment for the reasonable cost of the annuities. The provision of the collective bargaining agreement in question reads as follows:

> Section 1. With respect to the Jackson Operation Employee's Improved Pension Plan, the Company agrees that in the event of bankruptcy, insolvency, receivership, dissolution, or other such business failure, the Company will at such time, and in such event, fund the balance of the pension benefit payable to employees then on retirement through the purchase of an annuity from a life insurance company. Further, with respect to such plan, the Company agree [sic] that there shall be two hourly rate employees on the administrative committee appointed to carry out the general administration of the plan.

As stated earlier, when Yard-Man accepted the bid of Metropolitan Life Insurance Company to cover the Basic Pension Plan and thereby rejected the bid of Travelers Insurance Company to cover the Improved Plan, it distributed a lump sum actuarial equivalent of Improved Plan benefits to each retiree. It is undisputed that Yard-Man took such action unilaterally, without notice to or discus-

sion with the UAW. It further is undisputed that Yard-Man had an opportunity to purchase the required annuities through Travelers, but chose not to do so in order to accept the Basic Plan bid submitted by Metropolitan. Yard-Man does not assert that it was bound to accept the bid of Metropolitan, thereby necessitating rejection of the Travelers bid. Nor does Yard-Man allege that the Travelers bid was excessive or unreasonable. Instead, it appears simply that Yard-Man took the course of action which it found most economical, regardless of the obligations imposed under the collective bargaining agreement. In such circumstances the Court is constrained to hold that defendant Yard-Man is liable for breach of the provision requiring the purchase of pension annuities.

The question of an appropriate remedy poses more difficult issues, however. In light of the fact that any damage sustained by the retirees as a result of the lump sum distributions is highly speculative, specific enforcement of the collective bargaining agreement appears to be an appropriate remedy. *See* 11 WILLISTON ON CONTRACTS, §1418 (3d Ed. 1968). In addition to requesting an order requiring defendant to purchase annuities to fund the Improved Plan, however, plaintiffs also request an order applying the lump sum payments already distributed as advance monthly payments under the annuity obligation. Plaintiffs assert that it would be unfair to require a return of the lump sum distributions as a prerequisite to the purchase of annuities.

This Court cannot agree. As defendant points out, plaintiffs' proposal would grant the retirees benefits greater than those contained in the collective bargaining agreement; adoption of plaintiffs' position would provide the retirees with the benefits of *both* the lump sum distributions *and* continued pension coverage. Furthermore, even if annuities had been purchased to cover the Improved Plan at the outset, sixteen of the thirty-three participating retirees

would have received a lump sum distribution of the present value of their benefits.[3] Finally, as noted earlier in this opinion, the actuarial tables used to determine the lump sum present values of Improved Plan benefits were provided by the PBGC, and were based on an eight percent interest assumption rather than a ten percent interest assumption.

For these reasons, the Court finds that a return of the lump sum distributions must precede specific enforcement of defendant's obligation to purchase annuities to fund the Improved Pension Plan.

III Count Six

In count six of the complaint, plaintiffs contend that defendant Yard-Man is obliged to pay its former employees the vacation bonus allegedly due them under Article XIII of the collective bargaining agreement. Section 1 of that article provides:

> Section 1. The company agrees to pay hourly rated employees who are on the seniority list and who have one or more years seniority as of June 30, a vacation bonus based upon all monies earned from the company during the prior calendar year.

Section 2 sets forth the schedule for computing this payment and Section 3 states that the bonus will be paid just prior to inventory but not later than July 1. As stated earlier, plaintiffs submitted to arbitration a grievance based

[3] As the bidding insurance companies explained, an insurance annuity contract would have required a lump sum distribution of present value for all benefit payments of ten dollars per month or less. Sixteen of the thirty-three retirees were entitled to receive pension benefits of less than ten dollars per month. Affidavit of G.J. Evenwel, Jr. at 3.

upon defendant's failure to pay a 1976 vacation bonus computed with respect to employees' earnings in 1975; the arbitrator determined that under the contract the employees were not entitled to the disputed bonus. Plaintiffs do not argue the propriety of the arbitrator's decision in this case; instead, they seek to recover the vacation bonus on principles of quantum meruit and unjust enrichment.

Plaintiffs rely on three cases from the Sixth Circuit Court of Appeals to establish the former employees' right to the 1976 vacation bonus: *Local Lodge 2369* v. *Oxco Brush Div.*, 517 F.2d 239 (6th Cir. 1975); *Schneider* v. *Electric Auto-Lite Co.*, 456 F.2d 366 (6th Cir. 1972); *Packinghouse Workers* v. *Armour & Co.*, 446 F.2d 610 (6th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972). In all three cases, the Court found that the former employees were entitled to a vacation bonus as a matter of *contract interpretation*. Plaintiffs assert, however, that the rationales of these cases apply equally to the case at bar "since the same operative facts and law provide a right of recovery on either the contract theory or quantum meruit." Plaintiffs, however, have failed to note a crucial distinction between the cited cases and the case at bar; in none of the decisions cited had the issue of vacation bonuses been submitted to arbitration; in the present case, the issue *was* submitted to arbitration and ultimately *was decided*, in defendant's favor.

Because a fundamental goal of federal labor policy is the rapid and peaceful disposition of labor disputes through the means agreed upon by parties to a collective bargaining agreement, *see United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960), as a general rule the courts may not reconsider the merits of an arbitration decision. *E.g.*, *General Drivers* v. *Riss*, 372 U.S. 517 (1963). This remains true whether or not the Court agrees with the decision of the arbitrator. *Id.* It is

only where the grievance procedure was a sham, substantially unavailable or arbitrary, or where there has been fraud, deceit or a breach of the union's duty of fair representation that the Court may consider the merits of the arbitrator's decision. *See, e.g., Vaca* v. *Sipes*, 386 U.S. 171 (1967).

None of these circumstances is alleged in the case at bar. Plaintiffs attempt to avoid the prohibition on judicial review, however, through their assertion that relief is sought on the basis of quantum meruit rather than on the contract. They point particularly to the fact that the arbitrator was empowered to decide *only* the contract issue, and not the issue of quantum meruit relief. *See United Steelworkers* v. *Enterprise Wheel & Car Corp., supra; Detroit Coil Co.* v. *International Ass'n of Machinists & Aerospace Workers, Lodge #82*, No. 77-1144 (6th Cir. Mar. 21, 1979). Plaintiffs' own statement that "the same operative facts and law provide a right of recovery on either the contract theory or quantum meruit," however, reveals the unsoundness of this argument. *Oxco Brush, Schneider* and *Packinghouse Workers* make clear that the position now asserted by plaintiffs was equally available to them at the time of arbitration as a matter of contract interpretation. In fact, the Court in *Packinghouse Workers* cited three arbitration decisions applying the analysis relied on by plaintiffs to grant the requested relief. *See* 446 F.2d at 613. The Court must agree with defendant that the theory advanced by plaintiffs in this case constitutes an attempt to secure judicial review of the arbitrator's decision. That theory could, and should, have been advanced before the arbitrator at the time of arbitration. Plaintiffs cannot be allowed to withhold arguments until an adverse arbitration decision is rendered and then assert them in a judicial forum in an attempt to nullify that arbitration decision. *See Order of Ry. Conductors* v. *Clinchfield R.R.*, 407 F.2d 985 (6th Cir. 1969).

In sum, the Court concludes that plaintiffs are not entitled to relitigate the merits of an arbitration decision under a claim of quantum meruit when the underlying theory and supporting law rest upon a contractual analysis which properly should have been before the arbitrator. Regardless of the underlying merits of plaintiffs' claim, the Court must determine that in this action they are entitled to no relief.

For the reasons stated above, defendant's motion for summary judgment will be granted as to count six, and denied as to counts one and two. Plaintiffs' motion for summary judgment will be denied as to count six, and granted as to counts one and two to the extent provided in this Memorandum Opinion. Supplemental briefs will be filed addressing appropriate relief under count one and the appointment of a special master. Additional oral arguments may be scheduled at the request of the parties.

Appropriate orders shall be submitted.

(s) RALPH M. FREEMAN
United States District Judge

Dated: May 2, 1979.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION-DETROIT

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW) and LOCAL 134, UAW,

Plaintiff,

Case No. 772408
Judge Ralph M. Freeman

v.

YARD-MAN, INCORPORATED, a wholly-owned Delaware subsidiary corporation,

Defendant.

ORDER

This cause having come on to be heard on motion of Plaintiff, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (UAW) and its Local 134 for summary judgment, and on cross-motion of Defendant Yard-Man, Incorporated for summary judgment, and the Court having considered said motions and having heard the arguments of counsel and the Court having filed its Opinions dated August 2, 1979, and December 18, 1979, it is:

ORDERED, ADJUDGED and DECREED that Count VI of the Complaint herein be and the same is hereby dismissed, and it is further

ORDERED, ADJUDGED and DECREED:

(a) That Defendant shall, effective September 14, 1981, reinstate the life insurance coverage of each retiree for the face values as set forth in Schedule A, which is attached

hereto and made a part hereof, and shall continue the life insurance coverage specified therein for the natural life of each retiree.

(b) That Defendant shall, effective September 14, 1981, reinstate health insurance coverage for each retiree named in Schedule B, which is attached hereto and made a part hereof, and his or her spouse and dependents, and shall continue such Cross/Blue Shield MVF-2 health insurance (with prescription drugs with $2.00 co-payment) to each retiree upon the retiree's reaching age 65 and making such group insurance coverage available, at retiree expense, to each retiree until the retiree reaches age 65.

(c) That Defendant shall forthwith pay money damages to each retiree, or to the surviving spouse or estate, as the case may be, as follows:

(1) to those retirees age 65 and older who participated in Medicare Parts A and B and who purchased health insurance following the June 1, 1977 cancellation date, an amount equal to the premiums paid less any portion attributable to health insurance in excess of MVF-2 coverage, plus any expenses incurred which would have been paid under MVF-2 group coverage but were not covered under the policy purchased by the retiree;

(2) to those retirees age 65 and older who participated in Medicare Parts A and B who did not purchase health insurance following its June 1, 1977 cancellation, an amount equal to expenses incurred which would have been paid under MVF-2 group coverage;

(3) to those retirees under age 65 who purchased health insurance following its June 1, 1977 cancellation, an amount equal to the premiums paid by the retiree less the amount of premiums the retiree would have

paid for MVF-2 group coverage plus any expenses which would have been covered under the MVF-2 group coverage which were not covered under the policy purchased by the retiree;

(4) to those retirees under age 65 who did not purchase health insurance following its June 1, 1977 cancellation, an amount equal to expenses incurred which would have been covered under MVF-2 group coverage less the amount of premiums the retiree would have paid under the cancelled MVF-2 group insurance.

for each retiree who died or dies after the cancellation date of June 1, 1977 but before the effective date of reinstatement of such insurance;

(6) to each retiree who obtained comparable life insurance coverage after the cancellation date of June 1, 1977, an amount equal to the premiums paid less any portion of such premiums in excess of the cancelled value which may have accrued in the event the covering insurance purchased was whole life rather than term insurance;

(7) that Defendant shall pay retirees' losses between June 1, 1977 and the date that the reinstatement of MVF-2 group health insurance coverage and life insurance coverage is effective, computed in accordance with paragraph (c), subparagraphs (1) through (6) above;

(8) that Defendant shall pay the statutory interest on all money damages paid pursuant to paragraph (c), from the date the Complaint was filed or from the date each loss was incurred, whichever is later.

(d) That for each retiree who tenders the lump sum distribution previously received from Defendant, Defendant shall forthwith purchase an annuity sufficient to provide the monthly benefit which the retiree received prior to its

cancellation; that Defendant shall pay money damages to that retiree in an amount equal to the monthly benefit the retiree would have received from the date of its cancellation up to the date that the monthly benefit is reinstated, which amount shall offset the lump sum distribution tendered by the retiree; and Defendant shall pay the statutory interest on judgments on those amounts; provided however, that if, upon acceptance of an appropriate bid, the purchase of annuities is not reasonably possible for a retiree but the retiree would be entitled to a greater cash distribution than already received, Defendant shall remit to that retiree the difference, with statutory interest on judgments, computed from the date of the initial lump sum distribution.

(e) That Plaintiff recover its costs pertaining to Counts I and II of the Complaint and Defendant recover its costs pertaining to Count VI, the latter to be set off against the former.

(f) The undersigned is of the opinion that this order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from this order may materially advance the ultimate termination of this litigation.

(s) RALPH M. FREEMAN
United States District Judge

Dated at Detroit, Michigan
this 4th day of September, 1981.

Approved as to form:
JOSEPH KOCHIS
Attorney for Defendant

(s) NANCY SCHIFFER
Attorney for Plaintiffs

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW) AND LOCAL 134, UAW,

Plaintiffs-Appellees,

81-1591
81-8056

v.

YARD-MAN, INCORPORATED, a wholly owned Delaware Subsidiary Corporation,

Defendant-Appellant.

ORDER

(Filed: Nov 13 1981)

Before: KEITH, MERRITT and BROWN, Circuit Judges.

This matter is before the Court upon defendant's petition for permission to appeal pursuant to 28 U.S.C. §1292(b) from an order of the district court directing defendant to specifically perform certain provisions of a collective bargaining agreement. Defendant has also filed a notice of appeal under 28 U.S.C. §1292(a)(1), which has been docketed as No. 81-1591.

Upon consideration, we find that the petition satisfies the standards which must be met before permission to appeal is granted. *Cardwell* v. *Chesapeake and Ohio Railway*, 504 F.2d 444 (6th Cir. 1974). We also find that the district court's order is not appealable under 28 U.S.C. §1292(a)(1). *Fireman's Fund Insurance Co.* v. *Myers*, 439 F.2d 834 (3rd Cir. 1971). Accordingly,

It is ORDERED that the appeal in No. 81-1591 be, and it hereby is, dismissed for lack of jurisdiction. It is further ORDERED that the petition for permission to appeal be, and it hereby is, granted. Rule 5, Federal Rules of Appellate Procedure.

ENTERED BY ORDER OF THE COURT

(s) John P. Hehman
Clerk

No. 81-1718

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE, AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), and LOCAL 134, UAW,

Plaintiffs-Appellees,

v.

YARD-MAN, INCORPORATED,

Defendant-Appellant.

APPEAL from the United States District Court for the Eastern District of Michigan, Southern Division.

Decided and Filed September 9, 1983

Before: KENNEDY, Circuit Judge; BROWN, Senior Circuit Judge; and HOLSCHUH, District Judge.*

KENNEDY, Circuit Judge, delivered the opinion of the Court in which BROWN, Senior Circuit Judge, joined. HOLSCHUH, District Judge (pp. 22-44), filed a separate opinion concurring in part and dissenting in part.

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* The Honorable John D. Holschuh, United States District Court for the Southern District of Ohio, sitting by designation.

KENNEDY, Circuit Judge. Yard-Man appeals the District Court's grant of summary judgment that it breached its collective bargaining agreement with appellees, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW or Union) and its Local 134, UAW, by terminating the life and health insurance benefits of Yard-Man's retired employees at the expiration of the collective bargaining agreement and in substituting the payment of present cash value for its bargained obligation to purchase annuities to fund supplemental pensions. We affirm the District Court's holding that the retirees are entitled to continued insurance benefits but reverse its holding that Yard-Man could not, even with the consent of its pensioners, substitute cash value for annuities.

In August 1974, Yard-Man and the UAW entered into a collective bargaining agreement covering employees at Yard-Man's Jackson, Michigan, plant. The contract bore a stated expiration date of June 1, 1977. Less than a year after the signing of the contract the plant closed.

In April 1977, Yard-Man notified its Jackson retirees that existing health and life insurance benefits would terminate upon the collective bargaining agreement's expiration. Soon thereafter, the UAW filed grievances claiming that Yard-Man's unilateral action in terminating the retirees' life and health insurance violated that agreement. When Yard-Man refused to arbitrate, the UAW filed this action under § 301 (a) of the National Labor-Management Relations Act of 1947, as amended, 29 U.S.C. § 185 (1976), seeking to compel arbitration. Alternatively, it sought on behalf of the retirees specific performance of Yard-Man's obligation to provide health and life insurance benefits beyond the term of the collective bargaining agreement. It also sought damages to compensate retirees who had paid insurance premiums or medical expenses since the expiration of the collective bargaining agreement.

In a second count, the UAW requested specific performance

of Yard-Man's acknowledged obligation under the collective bargaining agreement to purchase annuities to fund its supplemental pension plan. After this suit was filed, and without notice or consultation with the UAW, Yard-Man distributed lump sum payments of the present value of the supplemental pension rights directly to each retiree.

The UAW waived its demand for arbitration and the parties filed cross-motions for summary judgment. Relying solely upon the language of the collective bargaining agreement, the District Court found that Yard-Man breached its contractual obligations when it cancelled the retirees' insurance upon expiration of that agreement. Yard-Man was ordered to provide health and life insurance for its retirees and their dependents, and to reimburse employers for losses due to termination of this insurance. The District Court also found that Yard-Man had failed to purchase annuities to fund the supplemental pension plan. It rejected Yard-Man's claim that it had performed this obligation by paying the cash value of the annuities to individual employees. The court ordered Yard-Man to purchase the collectively bargained annuities upon repayment by retirees of the lump sum distributions theretofore made. Damage questions were reserved.

The District Court certified its judgment under 28 U.S.C. § 1292(b) as a decision involving a controlling question of law as to which there is substantial ground for difference of opinion. This court permitted Yard-Man's appeal from the summary judgment, granting specific performance on both counts, and the UAW's cross-appeal from that portion of the District Court's judgment requiring repayment of the cash distribution made in lieu of supplemental pension annuities, as a condition of receiving such an annuity.

Resolution of the UAW's claim of lifelong insurance benefits for retirees requires interpretation of key contractual language in the collective bargaining agreement. The Union's second

claim, the undisputed failure by Yard-Man to purchase the annuities called for in the collective bargaining agreement, requires evaluation of Yard-Man's affirmative defense of substituted performance and the legitimacy of offering such performance directly to the retirees after suit had been filed and without notice to the union.

I. The Parties Intended to Create Lifelong Vested Insurance Benefits for the Yard-Man Retirees

The District Court properly recognized that whether retiree insurance benefits continue beyond the expiration of the collective bargaining agreement depends upon the intent of the parties. Clearly the parties to a collective bargaining agreement may provide for rights which will survive termination of their contractual relationship. *John Wiley & Sons* v. *Livingston*, 376 U.S. 543, 555 (1964). The parties may, for example, provide retiree insurance benefits which survive the expiration of the collective bargaining agreement. *Upholsterer's International Union* v. *American Pad & Textile Co.*, 372 F.2d 427, 428 (6th Cir. 1967); *International Union, UAW, Local 784* v. *Cadillac Malleable Iron Co., Inc.*, No. G82-75-CA1 (W.D. Mich. April 20, 1982); *American Standard, Inc.*, 57 Lab. Arb. BNA) 698 (1971)(Warns, Arb.); *Roxbury Carpet Co. and Textile Workers of America, AFL-CIO*, 73-2 Lab. Arb. Awards (CCH) ¶ 8521 (1973) (Summers, Arb.). Any such surviving benefit must necessarily find its genesis in the collective bargaining agreement. *See John Wiley & Sons, supra*, 376 U.S. at 550, 555; *Allied Chemical & Alkali Workers* v. *Pittsburgh Plate Glass*, 404 U.S. 157, 181 n. 20 (1971); *Local 1251, International Union, UAW* v. *Robertshaw Controls Co.*, 405 F.2d 29, 33 (2d Cir. 1968); *American Pad, supra*, 372 F.2d at 427-28.

The enforcement and interpretation of collective bargaining agreements under § 301 is governed by substantive federal law. *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448, 456

(1957). However, traditional rules for contractual interpretation are applied as long as their application is consistent with federal labor policies. *Id.* at 457. *See John Wiley, supra,* 376 U.S. at 548; *Transportation-Communication Employees Union* v. *Union Pacific R.R.*, 385 U.S. 157, 160-61 (1966); *Kellogg Company* v. *NLRB*, 457 F.2d 519, 524 (6th Cir. 1972).

Many of the basic principles of contractual interpretation are fully appropriate for discerning the parties' intent in collective bargaining agreements. For example, the court should first look to the explicit language of the collective bargaining agreement for clear manifestations of intent. *Kellogg Co., supra,* 457 F.2d at 524. The intended meaning of even the most explicit language can, of course, only be understood in light of the context which gave rise to its inclusion. *See Randall* v. *Lodge No. 1076, International Ass'n of Machinists and Aerospace Workers, AFL-CIO*, 648 F.2d 462 (7th Cir. 1981); *Forrest Industries, Inc.* v. *Local Union No. 3-436, International Woodworkers of America, AFL-CIO*, 381 F.2d 144, 146 (9th Cir. 1967); *United Steelworkers of America* v. *American Manufacturing Co.*, 363 U.S. 564, 570 (1960) (Brennan, J., concurring). The court should also interpret each provision in question as part of the integrated whole. If possible, each provision should be construed consistently with the entire document and the relative positions and purposes of the parties. *Kellogg Co., supra,* 457 F.2d at 524. *See Randall, supra,* 648 F.2d at 466; *Florida Canada Corp.* v. *Union Carbide & Carbon Corp.*, 280 F.2d 193 (6th Cir. 1960). As in all contracts, the collective bargaining agreement's terms must be construed so as to render none nugatory and avoid illusory promises. *See Cordovan Associates, Inc.* v. *Dayton Rubber Company*, 290 F.2d 858, 861 (6th Cir. 1961). Where ambiguities exist, the court may look to other words and phrases in the collective bargaining agreement for guidance. Variations in language used in other durational provisions of the agreement may, for example, provide inferences of intent

useful in clarifying a provision whose intended duration is ambiguous. *See American Pad, supra,* 372 F.2d at 427-48; *Kellogg Co., supra,* 457 F.2d at 524. Finally, the court should review the interpretation ultimately derived from its examination of the language, context and other indicia of intent for consistency with federal labor policy. This is not to say that the collective bargaining agreement should be construed to affirmatively promote any particular policy but rather that the interpretation rendered not denigrate or contradict basic principles of federal labor law.

Application of these basic rules of construction to the present case demonstrates the correctness of the District Court's conclusion that the parties intended to create nonterminating lifelong insurance benefits for the Yard-Man retirees.[1]

The key provision of the collective bargaining agreement, Article XVII, Section 4, states:

> When the former employee has attained the age of 65 years then:
>
> (1) *The Company will provide insurance benefits equal to the active group benefits . . . for the former employee and his spouse.*

(Emphasis added.)

Appellant Yard-Man asserts that this provision is plain and unambiguous on its face. Under Article XVII, Section 1 of the agreement, active employee benefits expressly terminate one month after an employee's "layoff." The benefits of all active employees thus terminated upon plant closure. Yard-

[1] The parties presented no extrinsic evidence of intent in this case and elected to rely exclusively on the terms of their collective bargaining agreement. The issues on appeal, therefore, are purely issues of law and not subject to the clearly erroneous standard of Federal Rule of Civil Procedure 52(a). *See Industrial Equipment Co. v. Emerson Electric Co.*, 554 F.2d 276, 284 (6th Cir. 1977). On appeal Yard-Man has raised arguments based on economic considerations which were not part of the record before the District Court. These do not, therefore, constitute any part of our analysis.

Man argues that since the insurance benefits of former employees are defined as "equal" to active employee benefits, those benefits must be equivalent in all respects *including duration*. Retiree benefits could then also be terminated at plant closure or, as actually occurred, with the expiration of the collective bargaining agreement.

We agree with the District Court that the key provision of the collective bargaining agreement is ambiguous. The language "will provide insurance benefits equal to the active group" could reasonably be construed, if read in isolation, as either solely a reference to the nature of retiree benefits or as an incorporation of some durational limitation as well. This phrase is no less ambiguous as to intended duration than language construed as creating continuing benefits in the various cases and arbitration decisions cited by the parties. *See, e.g., American Pad, supra,* 372 F.2d at 427 ("will continue to provide"); *Cadillac Malleable Iron Co., supra,* slip op. at 8, ("will pay the cost . . . for retired employees"); *Roxbury Carpet, supra,* 73-2 Lab. Arb. Awards ¶ 8521 ("shall continue to receive"); *Wellman Dynamics and UAW, Loc. No. 804.,* Amer. Arb. Assoc. Case No. 54-30 - 0505 - 72 (1973) (Herman, Arb.) ("shall provide").

This ambiguity requires that we look to other provisions of the collective bargaining agreement for evidence of intent and an interpretation which is harmonious with the entire document. This examination persuades us that Yard-Man and the Union intended to create vesting insurance benefits in the Yard-Man retirees which continue beyond the life of the collective bargaining agreement.[2]

First, termination of insurance benefits for active em-

[2] We agree with Yard-Man that traditional rules of contractual interpretation require a clear manifestation of intent before conferring a benefit or obligation. *See, e.g., Kellogg Co., supra,* 457 F.2d at 524. We do not agree, however, that the duration of the benefit once clearly conferred is subject to this stricture.

ployees was explicitly and clearly set out and yet under conditions – the layoff of seniority employees – typically inapplicable to retirees.[3] Moreover, there are variations in the duration of insurance benefits available to active employees dependent upon their seniority.[4] These variations and the impracticality of hinging retiree benefits to events as unpredictable and unstable as active worker layoffs make it improbable that retiree benefits were intended to depend in duration upon the fortunes of the active employees. Yard-Man's own course of conduct in continuing retiree insurance benefits after plant closure beyond the point as which insurance benefits could have been terminated for active employees indicates that it did not consider retiree benefits to be tied to the durational limitations of that active group.[5]

Second, the insurance provisions limit health insurance coverage for a retiree's spouse and dependent children in case of

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[3] Although the inappropriateness as to retirees of the language used to limit the duration of benefits available to the active group might indicate that the parties never considered or perhaps never resolved the issue of whether retiree benefits would continue after plant closure, it seems unlikely that retiree insurance benefits were meant to be tied to the layoff of active employees. As a practical matter layoff would be an inappropriate measure of retiree benefits, since typically only part of the work force would be laid off at any one time. A partial layoff of the work force rather than plant closure was more probably the contemplated purpose of the duration limitations created for active employees.

[4] Article XVII, Section 1, of the collective bargaining agreement provides that for seniority employees with one year or more seniority the cost of continuing insurance would be paid for out of the company's "Supplemental Unemployment Benefits Fund" while funds were available and thereafter at the employee's cost. For seniority employees with less than one year's seniority, insurance was to be continued for one month after layoff and then made available at their cost.

[5] The record is silent as to whether Yard-Man terminated benefits to its active employees at plant closure in accordance with the explicit terms of the collective bargaining agreement. Therefore, we consider only Yard-Man's failure to actually terminate retiree benefits at the point it now claims controls the duration of those benefits and not Yard-Man's treatment of the active group as well. Yard-Man's actual conduct is, in any case, inconsistent with the interpretation of the agreement it now urges upon this Court.

the retiree's death to expiration of the collective bargaining agreement.[6] While this limitation does not preclude an intent to also terminate the retiree's benefits with the expiration of the collective bargaining agreement in any event, it is more reasonable to infer that the spouse-dependent child provision was meant as an exception to the anticipated continuation of benefits beyond the life of the collective bargaining agreement.

Third, the retiree insurance provisions, Article XVII, Section 1, contain a promise that the company will pay an early retiree's insurance upon such retiree reaching age 65 but that the retiree must bear the cost of company insurance until that time. Since an employee is entitled under the collective bargaining agreement to retire at 55, the company's promise could remain outstanding for a ten-year period. If retiree insurance benefits were terminated at the end of the collective bargaining agreement's three-year term, this promise is completely illusory for many early retirees under age 62.

Fourth, the inclusion of specific durational limitations in other provisions of the current collective bargaining agreement suggests that retiree benefits, not so specifically limited, were intended to survive the expiration of successive agreements in the parties' contemplated long term relationship. Article XIX, for example, provides that "savings and pension plan programs" continue only for the duration of the collective bargaining agreement. No such specific limitation was provided to similarly restrict payment of retiree insurance benefits to the life of the collective bargaining agreement.[7]

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[6] Article XVII, Section 4, states: "In the event of death of the retiree who is age 65. the Company will continue to insure the surviving spouse and dependent children of the retiree until 6/1/77."

[7] We acknowledge that the collective bargaining agreement specifically provides a method for continuation of supplemental pension benefits beyond the agreement's duration by requiring the purchase of annuities in the event of plant closure, and yet, fails to provide a mechanism for funding retiree benefits. However, this failure does not necessarily imply that retiree benefits were not intended to survive

Finally, examination of the context in which these benefits arose demonstrates the likelihood that continuing insurance benefits for retirees were intended. Benefits for retirees are only permissive not mandatory subjects of collective bargaining. *Pittsburgh Plate Glass Co., supra,* 404 U.S. at 181-82. As such, it is unlikely that such benefits, which are typically understood as a form of delayed compensation or reward for past services, would be left to the contingencies of future negotiations. *See, e.g., Cadillac Malleable Iron, supra,* slip op. at 12-13; *Cantor* v. *Berkshire Life Ins. Co.,* 171 Ohio 405, 171 N.E.2d 518 (1960); *Roxbury Carpet, supra,* 73-2 Lab. Arb. Awards ¶ 8521, p. 4940. The employees are presumably aware that the union owes no obligation to bargain for continued benefits for retirees. If they forego wages now in expectation of retiree benefits, they would want assurance that once they retire they will continue to receive such benefits regardless of the bargain reached in subsequent agreements. Contrary to Yard-Man's assertions, the finding of an intent to create interminable rights to retiree insurance benefits in the absence of explicit language, is not, in any discernible way, inconsistent with federal labor law.[8]

Further, retiree benefits are in a sense "status" benefits which, as such, carry with them an inference that they continue so long as the prerequisite status is maintained. Thus,

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the agreement. The survival of the pension benefits is not not dependent on the existence of an annuities provision. Even though the agreement does not explicitly so provide, these benefits undoubtedly would have survived independent of any such mechanism. The mechanism itself merely confirms and provides the means of their survival.

[8] The appellants misapprehend the meaning of *Pittsburgh Plate Glass* insofar as vested retiree benefits are concerned. Clearly, the union may choose to forego such benefits in future negotiations in favor of more immediate compensation. It may not, however, bargain away retiree benefits which have already vested in particular individuals. Such rights, once vested upon the employee's retirement, are interminable and the employer's failure to provide them actionable under § 301 by the retiree. 404 U.S. at 181 n.20.

when the parties contract for benefits which accrue upon achievement of retiree status, there is an inference that the parties likely intended those benefits to continue as long as the beneficiary remains a retiree. This is not to say that retiree insurance benefits are necessarily interminable by their nature. Nor does any federal labor policy identified to this Court presumptively favor the finding of interminable rights to retiree insurance benefits when the collective bargaining agreement is silent. Rather, as part of the context from which the collective bargaining agreement arose, the nature of such benefits simply provides another inference of intent. Standing alone, this factor would be insufficient to find an intent to create interminable benefits. In the present case, however, this contextual factor buttresses the already sufficient evidence of such intent in the language of this agreement itself.

Yard-Man urges that a general durational clause which provided that the collective bargaining agreement should remain in force until June 1, 1977 demonstrates an intent that all benefits described in the agreement also terminate at that date. We do not agree. The clause does not specifically refer to the duration of benefits. The persuasive considerations we have discussed demonstrate that retiree benefits were intended to outlive the collective bargaining agreement's life and outweigh any contrary implications derived from a routine duration clause terminating the agreement generally. Such an intent takes precedence over a non-specific, general clause.

II. The Purchase of Annuities

Yard-Man agreed in the collective bargaining agreement to purchase annuities to fund its supplemental pension plan in the event of business failure. It is undisputed that Yard-Man has failed to do so. Instead, after the commencement of this suit, Yard-Man distributed directly to the individual retirees lump sum payments of the present value of these pension

benefits.[9] The UAW was neither consulted or notified prior to this distribution. Noting that the required annuities were available but not purchased because they would be uneconomical for Yard-Man, the District Court found Yard-Man in breach of its contractual obligations and ordered specific performance.[10]

Yard-Man asserts two defenses to liability which were rejected without discussion by the District Court: accord and satisfaction (substituted performance) and estoppel. Yard-Man argues that its offer of substituted performance in the form of lump sum distribution checks was accepted and the distribution retained by the retirees, thereby discharging its original obligation. Moreover, Yard-Man contends that since it could not invest or utilize those funds after the retirees accepted them, the retirees and the union which is suing on their behalf are estopped from seeking specific performance by virtue of Yard-Man's detrimental reliance.[11] The UAW in

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[9] Yard-Man also sent the retirees notice explaining the reasons for this substituted performance. While the amount of the lump sum distribution was solely determined by Yard-Man, there is no dispute as to its adequacy *as a cash distribution*. The Union's disagreement is whether *any* lump sum distribution could constitute an adequate substitute for the bargained for annuity.

[10] The District Court excused specific performance with respect to monthly benefits which were so small that it is not reasonably possible to purchase annuities.

[11] As pointed out by the dissent, Yard-Man is precluded from raising the defense of estoppel here on appeal because it failed to present such a defense or its equivalent in any form to the District Court.

We cannot agree, however, with the dissent's view that Yard-Man should also be precluded from maintaining a defense of accord and satisfaction or substituted performance by virtue of its failure to amend its answer and plead the defense affirmatively. Both sides in this dispute have argued on appeal over whether Yard-Man's substituted performance of providing lump sum cash distribution instead of purchasing annuities consituted a legitimate defense to the retirees' contract action. Before the trial court Yard-Man contended "that performance of the literal language of Article XVIII, Section 1, was impossible and that *a reasonable alternative form of compliance was adopted*." Yard-Man also asserted that its substituted performance "constitute[d] substantial compliance with the contract provi-

response asserts that neither defense can be effective in the present case because Yard-Man failed to notify the retirees' legal representative, the UAW, of the proposed substituted performance.

The contentions of the parties raise two related legal issues. First, whether retirees may, consistent with federal labor law, settle their contractual disputes over benefits directly with their former employer by means of accord and satisfaction without notice to or the consent of their union? Second, even if they may, are such direct settlements between retirees and the former employer, entered into without notice to or consent of the union, precluded once the union undertakes the legal representation of the retirees in a § 301(a) litigation?

The prime consideration in resolving the initial question must be whether driect settlement between retirees and their

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sion." Yard Man's arguments essentially raised, albeit in a confused fashion, three contract defenses; substantial compliance, substituted performance and impossibility. (The District Court ruled only on impossibility.) As is generally true under contract law, there is no essential difference between the defense of substituted performance as raised below and accord and satisfaction. 6 Corbin on Contracts, § 1276, p. 115; § 1278, p. 124. The arguments presented on appeal by Yard-Men are essentially the same as those it presented to the District Court; that is, that it has substantially complied with its contractual obligations *by virtue of offering an alternative means of performance which was accepted by the retirees.* The only difference, and one which is apparently deemed of paramount significance by the dissent, is that the words "accord and satisfaction" were never utilized before the District Court and the defendant's answer never amended to reflect its asserted defense. We believe that this defense, although inartfully presented, was placed before the trial court and fully addressed by the parties. Moreover, under the circumstances of this case, we do not deem Yard-Man's failure to amend its answer to affirmatively and formally plead the defense as dispositize of whether we can review this issue now. The Union, although fully aware of the nature of the defense, has never challenged Yard Man's position on such procedural grounds. Indeed, if the Union had so challenged Yard-Man's reliance on the defense, Yard-Man would undoubtedly have been granted leave to amend. The case was still in a pretrial posture when the defense arose. Refusal to allow amendment to allege a defense which came into being after the answer had been filed might well have been an abuse of the trial court's discretion. Since the substance of the defense was raised before the trial court in conjunction with the summary judgment motions and litigated by the parties without assertion of procedural error, it would be unfair to now, *sua sponte*, foreclose Yard-Man's legitimate defense.

former employer without notice to or the consent of the union is in any fashion inconsistent with the national labor statutes and their primary purrpose of promoting industrial peace. *Lincoln Mills*, 353 U.S. at 457. *See United Ass'n of Jourrneymen, Plumbers & Pipefitters* v. *Local 334, United Ass'n of Journeymen, Plumbers & Pipefitters*, 452 U.S. 615, 636-37 (1981)(Stevens, J., dissenting). *See generally* 29 U.S.C. § 151 (1976).

Initially, a distinction must be recognized between retiree contractual benefits under a collective bargaining agreement and the terms and conditions of employment created by that agreement for active employees. In the case of active employees, Congress has spoken directly on the issue of settlements between employer and employee. Title 29 U.S.C. § 159(a) specifically permits "adjustments" between employer and employee without intervention of the union so long as the agreement is not inconsistent with the terms of the bargaining agreement and the union has been given an opportunity to be present.

In *Pittsburgh Plate Glass Co.*, 404 U.S. at 176-82, the United States Supreme Court held that employers are under no obligation to bargain with unions over benefits for already retired workers. The Court reasoned that retired workers were neither "employees" under federal labor law nor properly members of the appropriate bargaining unit. As such, benefits for retired workers are not a mandatory but rather only a permissive subject of collective bargaining. Id. at 170, 180-82. Similarly, the union has no duty to represent retirees with the employer, although it may choose to do so. *Id.* at 181 n.20. Thus, since retirees are not employees under the Act, § 159(a) itself clearly does not apply.

There is no provision parallel to § 159(a) relating to settlements between retirees and former employers. Nor would creation of a § 159(a) type notice by analogy be appropriate. Section 159(a) represents a policy favoring settlements while

protecting the union's interest in the integrity of the collective bargaining agreement and the *terms and conditions of employment of the active employees.* The statute requires notification to the union prior to employer settlements with active employees out of recognition of the union's status as the active employee's sole bargaining representative. In the case of retirees, who are not employees or members of the bargaining unit and whose relationship to the employer and union is not directly controlled by the labor statutes, this primary rationale for notification no longer exists. While the union may have bargained for and received benefits for retirees, it does not have the same interest in the enforcement of those contractual rights on the behalf of individual retirees' that it has in the terms and conditions of employment of active employees. Unlike the active employees, retirees face no restrictions whatever in seeking fulfillment of contractual benefits directly from their former employer. *See Rehmar* v. *Smith,* 555 F.2d 1262, 1370 n.6 (9th Cir. 1976); 404 U.S. at 181 n.20. *See also Smith* v. *Evening News Ass'n,* 371 U.S. 195, 200-201 (1962). Similarly, the union is under no obligation to seek enforcement of such rights. *See, e.g., Nedd* v. *United Mine Workers of America,* 556 F.2d 190, 200 (3d Cir. 1977).

While a collective bargaining agreement is not simply an ordinary contract, *see, e.g., Hendricks* v. *Airline Pilots Association, International,* 696 F.2d 673, 676 (9th Cir. 1983), the vested rights of a retiree are essentially contractual in nature. *Cf.* 404 U.S. at 181 n.20, 188. Thus, the relationship of retiree and employer is unadorned with those special considerations peculiar to the relationship between an active employee, his union and the employer which justified creation of those minimal notice requirements that do exist for active employees under the national labor laws.[12] In settling a claim for vested

[12] The principle of accord and satisfaction has actually already been applied to the claims of an active employee in a context distinct from those at bar. *See Keppard* v. *International Harvester Co. and*

benefits, the retiree does not modify the collective bargaining agreement. Nor can the retiree affect the terms and conditions of employment by doing so, as an active employee might upon direct settlement of a grievance with the employer. A direct settlement between an active employee and the employer which is inconsistent with the terms of the collective bargaining agreement might, for example, result in an unfair labor practice. This is not the case for retirees who are free to settle their differences with the former employer on whatever terms desired, including a compromise over disputed contractual benefits.

Active union members need their joint common strength to bargain most effectively for improvements in wages, hours and working conditions. That need is explicitly recognized in the federal labor statutes. 29 U.S.C. §§ 151, 157, 159. *See also Pittsburgh Plate Glass*, 404 U.S. at 174-75, 175 n.15. As retirees, however, former employees do not need that joint common strength to enforce their vested contractual rights against their former employer. *See* 404 U.S. at 181 n.20. *See* also *id.* at 172-73; *Pittsburgh Plate Glass Co., Chemical Div.* v. *NLRB*, 427 F.2d 936, 942 n.9, 946 (6th Cir. 1970), *aff'd* 404 U.S. 157 (1971). Each retiree has an undisputable and effective remedy against the employer for a breach of contract under § 301(a).[13] *See* 404 U.S. at 176, 188. The retiree, no longer a member of the union, may not want the union to be notified of what the retiree wishes or intends to do. This Court

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International Union, UAW, 581 F.2d 764 (9th Cir. 1978). The Ninth Circuit in this case did not, however, explicitly analyze whether application of the principle was consistent with national labor policies.

[13] Nor is a need for joint assertion of contractual rights by retirees anywhere explicitly recognized by the labor laws. Title 29 U.S.C. §§ 158(d), 159(a)(1976), cited by the UAW in support of its contention of exclusive representation of retirees, are clearly inapposite. Under the rationale of *Pittsburgh Plate Glass*, retirees are *not* employees or members of the bargaining unit and, therefore, not subject to the protections or strictures of those provisions. *See* 404 U.S. at 181-182.

is unable to discern any policy basis in federal labor law which would be served by rejecting application of the well-established principle of accord and satisfaction to disputes over retiree benefits merely because they were created in collective bargaining agreements. Such a rejection would not in any fashion promote labor peace or the interests of the individual retirees.

The case for creating such a notice rule in the narrow circumstances in which a union has actually undertaken representation of the retirees in a § 301(a) litigation is somewhat more compelling. Under these circumstances the union has clearly manifested its interest in the preservation of the disputed benefits and presumably believes collective legal representation to be in the best interests of its former members. Yet, all of the reasons for not creating such a notice requirement in the absence of a union instituted § 301 suit apply with equal force when the union has undertaken such representation. Nor is there any new discernible inconsistency between direct retiree-employer settlements and national labor policies brought about by the union's active role in initiating a § 301 (a) litigation.[14] Most importantly, we do not believe that the union's interest in the retirees' contractual claims is sufficient to either demand judicial creation of a procedural notice requirement or override the right of individual retirees to settle their contractual disputes directly with their former employer.

The UAW contends that there can be no meeting of the minds on a substituted performance when the legal representative of the suing party has not been contacted. Since this is not true in normal civil litigation, *see e.g., Lewis* v. *S. S. Baune*, 534 F.2d 1115, 1122 (5th Cir. 1976); *Cook* v. *Moran Atlantic Towing Corp.*, 76 F.R.D. 481 (S.D. N.Y. 1977); *Krause* v.

[14] The UAW does not claim that Yard-Man's legal counsel, either directly or through its client, was the actual instigator of the present settlement. Such contact is prohibited by the Code of Professional Responsibility of the American Bar Association. *See* EC 7-18; DR 7-104.

Hartforrd A. & I. Co., 331 Mich. 19, 26-27, 49 N.W.2d 41 (1951), the validity of this assertion depends upon the existence of special considerations particular to federal labor law. As discussed above no such special considerations exist.

We do not suggest that the union has no standing to bring a suit on behalf of retirees. *United Steelworkers of America, AFL-CIO* v. *Canron, Inc.*, 580 F.2d 77, 80 (3d Cir. 1978). As a signatory to the contract it could bring an action for the third party beneficiary retirees. Nor do we suggest that the union is without interest in the outcome of potential settlements between the employer and the retirees. *See e.g.*, 404 U.S. at 176 n.17. *See also Toensing* v. *Brown*, 528 F.2d 69, 72 (9th Cir. 1975); *Rosen* v. *Public Service Electric and Gas Company*, 477 F.2d 90, 94 n.8 (3d Cir. 1973); *UAW* v. *Acme Precision Products*, 515 F.Supp. 537, 539-40 (E.D. Mich. 1981). Clearly the union's efforts in ensuring employer compliance with all of the terms of a collective bargaining agreement are a significant consideration for the active employees when choosing to retain the union as their exclusive bargaining representative. In this sense the union has a direct interest in maintaining the integrity of the retiree benefits created by the collective bargaining agreement.[15] *See* 404 U.S. at 176 n.17. Yet, the issue here is not whether or not the union has some residual representation interest in the fate of former members of the bargaining unit.[16] Rather, the issue essentially concerns the right of in-

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[15] The Union in this case, however, has presented no evidence that settlement by individual retirees in any way compromises the rights of other retirees or interests of the Union itself as signatory to the collective bargaining agreement. We are sympathetic of the Union's distress at not being notified by Yard-Man prior to their settlement offer to the retirees. This Court will nevertheless not speculate as to the existence of some unknown harm not asserted by the parties in interest.

[16] The dissent strongly implies that a union's duty to fairly represent the claims of its members extends to retirees. This proposition overlooks that the very rationale for creating a duty of fair representation — the exclusivity of contractual grievance and arbitration remedies — does not exist in the context of retirees who, without restraint, may litigate their disputes with their former employers

dividual retirees to resolve disputes over contractual benefits directly with the former employer without the union's involvement. There are simply no discernible federal labor law policies which restrict the right of individual retirees to settle their contractual disputes directly with their former employer without notice to the union.

Even accepting that some minimal form of notice to the union may be desirable once the union has undertaken legal representation on the retirees' benefits, there are compelling reasons why we should not adopt a judicially mandated procedural requirement. First, it is important that in requiring notice we would be creating a procedural rule, something courts are reluctant to do, unless required by due process. There would be the problem of defining when notice must be given. Should it be required for every settlement with every retiree? Clearly this would be inappropriate. Yet which rights or benefits are so significant that notice would be required? And by what measure do the district courts determine that question? This procedural rule would presumably be applied not only in this litigation, but in a myriad of unknown pending controversies. We cannot know its effect in those unknown cases. Without clear justification of significance beyond the special circumstances presented in the case at bar this uncertainty strongly cautions against judicial adoption of any rule.

This is particularly true where, as in this case, the law already provides protection against the harm perceived. If, on remand, the District Court determines that the retirees had been victims of overreaching, the present settlements could be set aside. *See, e.g., S.S. Braune*, 534 F.2d at 1122. Collectively bargained benefits for retirees have existed for scores of years now and so far as can be determined there has been no need for such notice. This is another pragmatic reason for not cre-

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directly under § 301. *See Vaca* v. *Sipes*, 386 U.S. 171 (1967); *Pittsburgh Plate Glass*, 404 U.S. at 181 n.20. However, since this issue is not squarely presented by the facts of the present case, we leave its ultimate resolution for another time.

ating such a duty now in the absence of some clear policy reason to do so.

In the present case the District Court held that, as a matter of law, Yard-Man could not provide a substituted performance in accord and satisfaction[17] of contractual obligations to the retirees. Since we have found this to be in error, it is necessary to determine what principles of accord and satisfaction should be applied. Even though essentially contractual in nature, the disputed retiree benefits in this case nevertheless arise under a collective bargaining agreement and may be, as here, the subject of a federal suit under § 301 of the National Labor Relations Act. Under these circumstances, it is clear that it is federal substantive law which controls resolution of the contractual dispute. *Lincoln Mills*, 357 U.S. at 456-57. In the absence of controlling federal law principles, however, we may look for guidance to general common law principles, including the substantive law of the state in which the contract arise. These borrowed principles in this context, of course, are "absorbed as federal law" and become the federal common law of labor disputes. See id. at 457 The principles of accord and satisfaction are well established in both the general common law and the law of Michigan where the present contract originates. The basic elements of this affirmative defense align themselves with normal contract principles of offer and acceptance. There must be a disputed claim,[18] a substituted performance agreed

[17] The Restatement (Second) of Contracts (Revised Ed. 1981) makes a distinction between the principles of substituted performance and accord and satisfaction based on the existence or not of an executory contract. *Compare* § 278 (substituted performance) *with* § 281 (accord and satisfaction). Other authorities do not seem to recognize such a distinction. *See, e.g.*, 5 Williston on Contracts § 680 at 258-61 (3d Ed. 1961); 6 Corbin on Contracts, § 1276 (1962). Although the present settlement would appear to technically fit best into the Restatement's § 281 definition, the distinction is one without a difference under the facts of the present case. The defense raised in this case requires the same essential elements whether characterized as substituted performance or accord and satisfaction.

[18] Professor Corbin indicates that it is not necessary for the defense of accord and satisfaction that the claim is doubtful or disputed. *See* 6 Corbin on Contracts § 1278 p. 126. Whether a "dispute" is

upon and accomplished, and valuable consideration. *E.g., Risk* v. *Wells*, 362 Mich. 414, 420 (1961); 262 (1933). *See also Keppard* v. *International Harvester, Co.*, 581 F.2d 764 (9th Cir. 1978)(applying California law); *Brock & Blevins Company* v. *United States*, 343 F.2d 951, 955 (Ct. Cl. 1965). *See generally* 6 Corbin on Contracts § 1276 (1962 & Kaufman, Supp. 1982); 5 Williston on Contracts § 680 at 259-61 (3d Ed. 1961). For the reasons already discussed we see no discernible inconsistency between these general principles and federal labor law.

The factual predicates for Yard-Man's defense remain unresolved and summary judgment, therefore, is inapporpriate. On remand the District Court must apply the basic elements of the affirmative defense of accord and satisfaction to determine whether such defense is viable. The court should also consider any contention that the actions of Yard-Man constituted overreaching. We affirm in part and reverse in part and remand this issue to the District Court for further proceedings consistent with this opinion.

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necessary or not is, however, irrelevant in the present case since a bona fide dispute was clearly created by Yard-Man's initial protestation to the union that performance of the strict terms of the collective bargaining agreement was sufficiently unreasonable to excuse literal performance. No more "dispute" than this is needed in order for the principles of accord and satisfaction or substituted performance to apply.

HOLSCHUH, District Judge, concurring in Part I, dissenting in Part II.

I fully concur in the majority's holding in Part I of its opinion that Yard-Man, in terminating the life and health insurance benefits of its retired employees at the expiration of the collective bargaining agreement, breached that agreement.

However, I must respectfully dissent from the majority's holding in Part II of its opinion. I believe that the judgment of the District Court ordering specific performance of Yard-Man's contractual obligation to purchase an annuity for its retirees should be affirmed for several reasons. First, the District Court's rejection of Yard-Man's sole defense in the lower court of substantial performance is not contested on this appeal, and Yard-Man cannot raise for the first time on appeal the alleged affirmative defenses of accord and satisfaction and estoppel. Second, even if these defenses could be asserted for the first time on appeal, there is no evidence in this record that would support them. Third, and of great importance, even if these defenses could now be asserted for the first time, the application of these defenses under the circumstances of this case would be inconsistent with national labor policies and should not be incorporated into the substantive federal law governing this action. The majority opinion finding the defense of accord and satisfaction to be applicable in this case represents, in my view, a troublesome precedent that could encourage an employer who desires to change retirement benefits to ignore the union that won those benefits in the collective bargaining process and to deal directly with the unorganized and economically vulnerable retirees.

I.

Under the collective bargaining agreement between Yard-Man and the UAW, employees and retirees at Yard-Man's Jackson, Michigan plant were covered by two separate pe..

sion plans – the Basic Plan, a qualified plan under the Employee Retirement Income Security Act of 1974 (ERISA), and the Improved Plan, a non-qualified plan under ERISA. With respect to the Improved Plan, Article XVIII of the agreement expressly and unequivocally required Yard-Man, in the event of a business failure, to "fund the balance of the pension benefits payable to employees then on retirement through the purchase of an annuity from a life insurance company." Yard-Man does not dispute that the closing of the Jackson plant was an event under Article XVIII that triggered Yard-Man's duty to purchase the required annuity.

Following the closing of the Jackson plant in 1975, the union brought this action in October 1977 seeking, among other forms of relief, specific performance of Yard-Man's obligation to purchase the required annuity. After this action had been commenced, Yard-Man requested from five major insurance companies bids for an annuity to cover benefits under both the Basic Plan and the Improved Plan. Three of the five companies responded with quotations. New York Life Insurance Company refused to bid on the Improved Plan because it was a non-qualified pension plan; the Travelers Insurance Company submitted a bid on the Improved Plan contingent upon the award of the annuity for the Basic Plan; and the Metropolitan Life Insurance Company submitted a bid for both plans on the assumption that the Improved Plan was a qualified pension plan. Yard-Man chose to accept Metropolitan's bid to cover the Basic Plan only, thereby rejecting Travelers' bid to cover both the Basic and Improved Plans.

Yard-Man decided that, rather than purchasing the required annuity for the Improved Plan (at considerable expense to Yard-Man), it would unilaterally, without notice to the union, terminate all further payments that the annuity would have provided and distribute instead lump sum cash payments in amounts determined by Yard-Man to be equal to the

present value of the expected future payments under the Plan. Yard-Man then sent the following notice to the retirees participating in the Improved Plan:

> **NOTICE TO FORMER PARTICIPANTS IN THE YARD-MAN PENSION PLAN – JACKSON**
>
> The Improved Yard-Man Pension Plan – Jackson was an arrangement by which Yard-Man Inc. made gratuitous payments out of general assets to supplement benefits provided under the Yard-Man Pension Plan – Jackson. The Improved Plan was designed to provide at least a minimum amount of benefits to participants who retired on or before July 31, 1975. Improved Plan benefits were included in with your periodic payments made under the Yard-Man Pension Plan – Jackson through October 31, 1978.
>
> Effective November 1, 1978, each participant in the Improved Yard-Man Pension Plan – Jackson will receive a lump sum payment equal to the present value of all his or her expected future payments (see cover letter for figures). There will be no further payments made after the lump sum distribution. This lump sum distribution is *not* being made from a qualified retirement plan.
>
> Any overpayments made under the Yard-Man Pension Plan – Jackson will be recovered by reducing the amount of any lump sum distribution. However, if the overpayment exceeds the amount of any lump sum distribution, there will be no additional reduction in benefits. If you have any questions, please contact Yard-Man Inc., Montgomery Ward Plaza, 3N, Chicago, Il 60671.

II.

It is undisputed that at the time this lawsuit was filed on October 5, 1977, Yard-Man had not purchased the annuity required by Article XVIII of Yard-Man's contract with the

union. Accordingly, in Count II of its Complaint the union sought specific performance of Yard-Man's contractual obligation to fund by purchase of an annuity the balance of the pension benefits due under the Improved Plan.

Yard-Man's Answer to Count II was basically an admission of its obligation but a denial of the breach and a denial of the union's claimed right of arbitration (subsequently waived by agreement of the parties). Although the Answer set forth a list of affirmative Defenses, it included neither estoppel, as it is now asserted,[1] nor accord and satisfaction. It is understandable, of course, why Yard-Man initially did not plead in its Answer the affirmative defenses of accord and satisfaction and estoppel based upon receipt by retirees of the cash distributions, since no such distribution had yet been made. Yard-Man filed its Answer on February 6, 1978, and made the cash distributions on or about November 1, 1978.

Although Yard-Man in its Answer reserved the right "to plead such further defenses after continuing investigation and discovery pursuant to court rules," the record is clear that Yard-Man never filed any supplemental Answer raising the defenses of accord and satisfaction and estoppel arising from the cash distribution or sought to add either of those defenses to the list of affirmative defenses attached to its original Answer. The record is also clear that Yard-Man had ample opportunity subsequent to the cash distribution to raise these defenses. The union filed its motion for summary judgment in February 1979, and Yard-Man responded to that motion and filed its cross-motion for summary judgment in March 1979. The District Court held a hearing on the motions for summary judgment in April 1979 – some five months after

[1] Affirmative defense Number 7 asserted estoppel, but not as Yard-Man now asserts it: "plaintiffs are estopped from bringing this action because they failed to file timely grievances under the labor contract and are further barred by the doctrine of laches and/or the applicable statutes of limitations."

the cash distributions were made. At no time did Yard-Man assert either of the defenses it now raises as any defense to the union's motion for summary judgment or as a basis to support its own motion for summary judgment – either in the briefs filed or in the oral arguments made in the District Court.

In its trial court brief, Yard-Man contended that "the lump sum distribution constitutes substantial compliance with the contract provision and was the only viable alternative open to defendant by which the benefits of the Improved Plan could be distributed," (J.A. 81A), and that "performance of the literal language of Article XVIII Section 1 was impossible and that a reasonable alternative form of compliance was adopted." (J.A. 83A). In the oral argument, Yard-Man again argued that in view of "the practicalities of the situation," Yard-Man "attempted to do what was reasonable, what was fair." (J.A. 166-167A). The District Judge found neither the argument of "substantial compliance" nor that of "impossibility of performance" to be meritorious, finding, instead, that Yard-Man could have purchased the required annuity but chose to make the cash distributions simply because it was the most economical course for Yard-Man to take. (J.A. 110A).

My examination of the Joint Appendix reveals that the defenses of accord and satisfaction and estoppel were raised for the first time before this Court in the brief filed by Yard-Man.[2] Although the union responded to the appellant's argu-

[2] Yard-Man's arguments in the trial court that it had substantially performed its obligation or that complete performance of its obligation was impossible do not constitute an assertion of the affirmative defenses of accord and satisfaction or estoppel. Yard-Man's arguments were simply that its conduct in sending the retirees cash payments constituted sufficient performance of its contractual duty and did not raise any issue regarding Yard-Man's intention that these payments were to be in settlement of a disputed claim or that the beneficiaries in accepting those payments intended to do so as a settlement of a disputed claim. Yard-Man's arguments concerned only the sufficiency

ments, I do not believe appellee's response prevents this Court from adhering to its firmly established principle of considering on appeal only questions that were presented to the District Court. *Ash* v. *Board of Education of Woodhaven School Dist.*, 699 F.2d 822, 827 (6th Cir. 1983); *Roberts* v. *Berry*, 541 F.2d 607, 610 (6th Cir. 1976); *Compton* v. *Tennessee Dept. of Public Welfare*, 532 F.2d 561, 563 n. 1 (6th Cir. 1976).

This appeal, therefore presents a situation in which the defendant failed to raise before the trial court two defenses that are required by Fed. R. Civ. P. 8(c) to be raised as affirmative defenses and now, after judgment has been rendered in favor of plaintiff, defendant raises them for the first time on appeal from that judgment. Clearly, in my view, under these circumstances an appellate court should not consider these waived defenses and belated arguments, thereby giving the defendant an undeserved "second bite of the apple." Inasmuch as the affirmative defenses were not raised in the trial court, it is incorrect to say, as the majority does, that they were "rejected without discussion by the District Court" or that "the District Court held that, as a matter of law, Yard-Man could not provide a substituted performance in accord and satisfaction of contractual obligations to the retirees." The District Court did not reject these defenses nor did it reach any conclusion regarding their applicability, simply because they were never presented to that Court. The

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of defendant's conduct and were based upon different factual and legal considerations than those relevant to the defenses of accord and satisfaction or estoppel, which involve alleged conduct on the part of the plaintiffs. Yard-Man's arguments of performance could properly be made under its general denial of a breach of the agreement. Any defense based upon the beneficiaries' alleged conduct in acceptance of the cash payments, however, would avoid the question of performance and seek to escape liability on other grounds. As matters of avoidance and affirmative defenses, therefore, accord and satisfaction and estoppel were required to be set forth in defendant's pleadings, Fed. R. Civ. P. 8(c), and cannot be raised for the first time after a judgment has been rendered in favor of the plaintiff. *Cf. Marx & Co., Inc.* v. *Diners' Club, Inc.*, 550 F.2d 505, 512 (2d Cir. 1977).

District Judge having committed no error, the judgment below should be affirmed.[3]

III.

Even if it is assumed that the applicability of the defenses of accord and satisfaction and estoppel is properly before the appellate court for review, then it is important, at the outset, to determine specifically what issues this case does and does not present for our consideration. In my opinion, the reasoning of the majority is based in part upon issues that are *not* involved in this case.

No dispute has ever existed in this case concerning Yard-Man's express, unambiguous promise in the collective bargaining agreement to purchase for the retirees the insurance company annuity set forth in Article XVIII of the contract. Yard-Man has never denied this obligation. Instead of fulfilling that promise, however, Yard-Man unilaterally, without any prior notice to the union or retirees and without any prior consent or agreement of the union or retirees, decided

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[3] I do not deem it "of paramount significance," as the majority suggests, that the words "accord and satisfaction" were never utilized before the District Court, although it does seem to me that if Yard-Man truly intended to raise that well recognized defense in the trial court it would have referred to it by its name at some point somewhere in its briefs or in its oral argument to the trial Judge. Nor do I deem the failure of Yard-Man to amend its answer to assert this affirmative defense to be in and of itself dispositive of the question whether it can now raise that defense, although, again, it seems to me that if Yard-Man truly intended to raise that defense in the trial court it would have taken the simple step of seeking leave of the District Court to amend its Answer. Instead, I base my conclusion that Yard-Man is now foreclosed from asserting this defense on the fact that the record simply does not show any attempt by Yard-Man — until it reached the appellate court — to rely upon this defense, to argue its applicability, to cite authority in support of the defense or to otherwise, in some manner, let the trial Judge know that it was being raised and presented to him for decision. I do not regard the few words in a single sentence in a brief, "a reasonable alternative form of compliance was adopted," as presenting to the trial court a defense of accord and satisfaction or substituted performance. Those few words appeared in the context of Yard-Man's argument that it was impossible to perform the contract as written and that the alternative chosen by Yard-Man constituted substantial performance of a contract, a defense considered and rejected by the District Court.

that it would *not* fulfill that promise because of the cost to Yard-Man but, instead, would terminate the Improved Plan and send lump sum cash payments, in amounts determined solely by Yard-Man, to the retirees. This attempt by Yard-Man unilaterally to modify the contract by selecting a benefit of Yard-Man's choosing for a benefit that was included in its collective bargaining agreement with the union was an obvious breach of that agreement. The issue, therefore, is more correctly stated as follows: whether an employer, having contractually bound itself in a collective bargaining agreement to provide certain vested benefits to its retirees, may unilaterally modify that contract, without notice to or consent of the union, the other contracting party, by selecting different types of benefits for the retirees and then assert, in a breach of contract action by the union, the defenses of accord and satisfaction and estoppel based upon the failure of the retirees to reject those benefits.

While it is important to state the precise issue that is before us, it is equally important to state what is *not* before us. Contrary to the majority's statement of the issues, this case does *not* involve any "settlements" by the retirees of any disputed claims, either collectively or individually. Yard-Man never denied its contractual obligation to the retirees. This case is to be distinguished, therefore, from cases in which an employee or a retiree seeks in a § 301 action to enforce the terms of a collective bargaining contract, the employer denies any liability under the contract, and a third party is called upon to resolve a *dispute* over the interpretation or applicability of the contract.[4] The present case, to the contrary, involves an attempt by the employer to *change* the terms of a collective bargaining agreement regarding an entire class of beneficiaries. Instead of providing the benefits

[4] In such a case it is possible that the doctrines of accord and satisfaction and estoppel may be asserted as defenses to the individual's lawsuit. *Cf. Keppard* v. *International Harvester Co.*, 581 F.2d 764 (9th Cir. 1978), cited by the majority in footnote 12 and discussed *infra* in this dissenting opinion.

admittedly required by the contract, the employer, on its own initiative and without notice to or approval of the other contracting party, unilaterally chose to provide an entirely different kind of benefit. It is, purely and simply, a unilateral modification of the contract, constituting a breach of that contract, and it is my belief that under the circumstances of this case the common law defenses of accord and satisfaction and estoppel are not applicable as a matter of common law. Even if applicable as a matter of common law, the assertion of such defenses under the circumstances of this case would be contrary to firmly established policies of federal labor law.

IV.

The majority sets forth the basic elements of the common law defense of accord and satisfaction as follows: "there must be a disputed claim, a substituted performance agreed upon and accomplished and valuable consideration." As Judge Frank noted in *Fleming* v. *Post*, 146 F.2d 441 (2d Cir. 1944), "[a] condition precedent to a valid accord and satisfaction is the establishment of a bona fide dispute over liability." I fail to see any "bona fide dispute over liability" in the present case. Yard-Man never denied its obligation to purchase an annuity to fund the Improved Plan; it simply tried to discharge that obligation in a manner different than that required by the contract. In other words, the dispute in this case is *not* over Yard-Man's contractual liability; the dispute is over the payments themselves, *i.e.*, did they constitute "substantial compliance" with Yard-Man's contractual duty. The payments were not in *response* to a disputed claim; they *created* a disputed claim.

Furthermore, I have difficulty in finding any evidence that "a substituted performance agreed upon and accomplished" existed under the facts of this case. Yard-Man's idea of what would be a "substituted performance" was Yard-Man's idea and no one else's. It did not discuss this possible substitution with the union; it did not discuss it with the retirees.

In fact it never sought approval of anyone, other than perhaps its own attorney, to make this substitution. The majority, however, finds nothing wrong with Yard-Man's conduct in bypassing the union, citing a number of cases in which there has been a "meeting of the minds on a substituted performance when the legal representative of the suing party has not been contacted." Those cases, however, all involved actions in which parties to litigation, without the approval of their attorneys, settled their disputes. I have absolutely no quarrel with the established principle that parties have a right to settle or compromise their litigation without the knowledge or consent of their attorneys. That proposition would be applicable here if defendant Yard-Man and plaintiff union had met and reached an agreement, subject to the vested rights of the beneficiaries, to settle this litigation, even though the agreement was reached without the knowledge or consent of their respective attorneys. However, I do not think the principle is applicable when the *parties* to this litigation never reached a settlement, compromise or agreement.

The plaintiff in this action was never consulted about Yard-Man's proposed substituted performance. Moreover, Yard-Man's notice to the retirees did not constitute a suggestion, a request or a choice. It was a statement of a fact accomplished – *not* an offer to be accepted or rejected by the retirees. Few, if any, elderly retirees are familiar with the subtle refinements of the doctrine of accord and satisfaction, and no basis exists for any finding that an accord and satisfaction defense could be available to Yard-Man under the circumstances of this case.

Nor, of course, could any estoppel defense be available to Yard-Man. In *Lovetri* v. *Vickers, Inc.*, 397 F. Supp. 293 (D. Conn. 1975), the employer, upon closing a plant, sent termination notices that gave plaintiff retirees the option of receiving a cash payment or an annuity. The plaintiffs

elected the option of receiving the cash but subsequently brought suit claiming that the employees were entitled to a more favorable choice of benefits. In rejecting any estoppel defense, the court said,

> [p]laintiffs, however, cannot be estopped because they took cash "in lieu of" their pension benefits. They were not offered the cash as a liquidation of a disputed right, *Fleming* v. *Post*, 146 F.2d 441 (2d Cir. 1944), or as a part of a plant closing agreement intended to supersede the pension plan and their rights thereunder, *cf. Craig* v. *Bemis Co., Inc.*, 374 F. Supp. 1251 (S.D. Ala. 1974). Whatever the language used in the notice of termination of employment, plaintiffs were offered what defendant even now maintains were their rightful options under the pension plan. They did not forfeit the right to challenge the adequacy of the choice simply because they elected one or the other of the options they were given.

Id. at 297.

The employer in the present case did not give the retirees *any* option; the employer did not offer cash payments as a liquidation of a disputed right; the employer does not allege the existence of a plant closing agreement intended to supersede the collective bargaining agreement; and clearly the retirees are not estopped from demanding enforcement of their contract rights by virtue of Yard-Man's arbitrary decision to substitute something else in place of what the union bargained for. Aside from the fact that the required elements of an estoppel are nowhere present in this record insofar as the retirees are concerned, the plaintiff seeking enforcement of the contract in this action is the other signatory to the contract, the employees' union. Yard-Man does not assert – nor could it – any claim that the union has done anything that would be the basis for an estoppel defense.

V.

Even if Yard-Man had raised accord and satisfaction and estoppel as defenses in the lower court and even if some evidence existed in this record to legitimately support such defenses, I would hold – as a matter of federal substantive law – that in suits under § 301 the assertion of such state law defenses under the circumstances of this case is incompatible with federal labor policy.

A.

As the majority correctly notes in Part I of its opinion, it is well settled that the enforcement of collective bargaining agreements under § 301 is governed not by state law but by federal substantive law. *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448, 456 (1956). The majority also recognizes that in the absence of express federal substantive law a federal court may look to state law in fashioning new federal substantive law. However, the *Lincoln Mills* Court cautioned that courts are to utilize state law only if it is compatible with the purposes of § 301 and only if it is "the rule that will *best* effectuate the federal policy." *Id.* at 457 (emphasis added).

The majority has apparently concluded that the application of the Michigan law of accord and satisfaction to the facts of this case is to no extent inconsistent with national labor policies, that application of such law "will best effectuate the federal policy," and that such law is, therefore, properly absorbed as federal law. My opinion, however, is that the state law contract defense of accord and satisfaction *as applied in this case* is inconsistent with federal labor policy and that this is a case in which "preoccupation with the doctrines of ordinary contract law will thwart realization of Congressional policy." *United Brotherhood of Carpenters and Joiners* v. *Hensel Phelps Construction Co.*, 376 F.2d 731, 735 (10th Cir. 1967).

When determining whether the application of state law is compatible with federal labor policy, it is important to note that since *Lincoln Mills* the Supreme Court has repeatedly emphasized that a collective bargaining agreement is not an ordinary contract and is not governed by ordinary contract principles that govern contracts between private parties. *Trans-Communications Employees Union* v. *Union Pacific Railroad*, 385 U.S. 157 (1966); *John Wiley & Sons* v. *Livingston*, 376 U.S. 543 (1964). Accordingly, federal courts have not hesitated to depart from basic contract principles in dealing with collective bargaining agreements. For example, in *John Wiley & Sons, supra*, the Court held that under certain conditions nonparties may be bound by a collective bargaining agreement. Similarly, in *Darnel* v. *East*, 573 F.2d 534 (8th Cir. 1978), the Eighth Circuit Court of Appeals rejected the contract defense of lack of consideration as incompatible with federal labor policy. "In dealing with such agreements courts should not be preoccupied with principles which might apply to an ordinary contract." *Hendricks* v. *Airline Pilots Association International*, 696 F.2d 673, 676 (9th Cir. 1983), (citing *Lodge 1327, Int'l Ass'n of Machinists* v. *Fraser & Johnston Co.*, 454 F.2d 88, 92 (9th Cir. 1971)).

B.

In reaching its conclusion that Yard-Man's assertion of the defense of accord and satisfaction, arising from Yard-Man's deliberate bypassing of the union and direct dealing with individual retirees, is not incompatible with federal labor policies, the majority relies heavily upon *Allied Chemical & Alkali Workers* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971). That case does not, in my view, support such a conclusion.

In *Pittsburgh Plate Glass* the employer informed the union of its intention to write each retired employee, offering to pay that retiree's supplemental Medicare premium if the em-

ployee would withdraw from the negotiated health insurance plan. Despite the union's objections, the company circulated its proposal or offer to the retired employees, and 15 of the 190 retirees elected to accept it. The union filed an unfair labor practice charge against the employer, contending that the employer's conduct was a refusal to bargain collectively with the union and a unilateral mid-term modification of the contract in violation of 29 U.S.C. §§ 158(a)(5) and 158(d). The single and only issue was whether the employer had committed an unfair labor practice. The Supreme Court concluded, as a matter of statutory history and construction, that the statute requiring collective bargaining "with respect to wages, hours, and other terms and conditions of employment" included neither retirement benefits nor retirees within its scope. The Court also held that a "modification" of a collective bargaining contract is a prohibited unfair labor practice only when it changes a term that is a mandatory rather than a permissive subject of bargaining. At the same time, however, the Court pointed out that the narrow issue before it did not concern the enforceability of the contractual obligations to the retirees. *Id.* at 177 n.17. The Court ended its decision with the important statement that,

> [t]he remedy for a unilateral mid-term modification to a permissive term lies in an action for breach of contract, . . . not in an unfair-labor-practice proceeding.

Id. at 188 (footnote omitted).

The present action is, of course, exactly the type of breach of contract action under § 301 that the Supreme Court indicated is the proper course to enforce compliance with the terms and conditions of the collective bargaining agreement. Nothing in *Pittsburgh Plate Glass* affects to the slightest degree the fundamental law that in such contract enforcement actions considerations of national labor policies override incompatible common law defenses.

Relying upon *Pittsburgh Plate Glass*, the majority concludes that 29 U.S.C. § 159(a), in particular the provisio contained therein, has no application to retirees. The proviso reads as follows:

> *Provided*, that any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, that the bargaining representative has been given opportunity to be present at such adjustment.

I agree that this statute has no direct application to the retirees in this case. By its express terms it applies only to employees and only to the presentation of grievances by those employees. But the critically important aspect of this statute is its codification of one of the most fundamental principles of national labor law, *i.e.*, that collective bargaining contracts, once executed, are to be strictly enforced according to their terms. The statute in question permits the employer, after notice to the union, to adjust an employee's grievance under the contract, but it does *not* permit the employer to make any adjustment that is inconsistent with the terms of the agreement.

Just as an employer may adjust or settle an employee's individual grievance, provided it is not inconsistent with the terms of the collective bargaining contract, so may an employer adjust or settle a retiree's individual claim that is in dispute. The employer's freedom to compromise and settle an individual's disputed claim is not, however, a license to change the terms of the contract itself. In the present case, the issue before us does not concern "the right of individual retirees to resolve disputes over contractual benefits directly with the former employer without the union's in-

volvement," as the majority characterizes it. The issue before us concerns the right of an employer to instigate unilaterally a change of undisputed contractual benefits owed to all its retirees, to bypass the union in dealing directly with the retirees, and then to assert common law defenses of accord and satisfaction and estoppel based upon the retirees' failure to reject the new benefits. I believe that to permit such defenses under these circumstances does violence to (1) the equal bargaining strength concept that is the foundation of collective bargaining between employer and employees, (2) the strong policy of honoring collective bargaining agreements and the union's interest in seeing that collective bargaining contracts, once executed, are enforced according to their terms, and (3) the retirees' interest in preserving vested pension benefits during the years when the old and the infirm depend heavily upon such benefits. Each of these concerns is grounded in national labor policies that greatly overshadow an employer's interest in relying upon state law defenses of accord and satisfaction or estoppel to effectuate a modification of a collective bargaining agreement.

1.

The special protection afforded collective bargaining agreements is grounded in a basic principle of labor law:

> National labor policy has been built on the premise that by pooling their economic strength and acting through a labor union freely chosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wages, hours, and working conditions.

N.L.R.B. v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967). It was by this very process of the active Yard-Man employees "pooling their economic strength" that they were able to bargain not only for their own wages, hours and working

conditions but also for important economic concessions for their former fellow employees who reached retirement status. Although the employer was not required to negotiate those benefits for the retirees, *Pittsburgh Plate Glass, supra,* it nevertheless chose to do so and to make its obligations a part of the collective bargaining agreement, thereby avoiding a disruption of its business by a strike. The active employees, likewise, were not required to negotiate those benefits for the retirees, but they did so and undoubtedly at some economic sacrifice on their part. The concessions given by the employer and the benefits gained by the retirees were hammered out in the bargaining process and were the product of collective activity by labor – a federally recognized and protected activity.

The concept underlying Congressional labor policy is an attempt to place the employer and its employees in relatively equal positions of bargaining strength. The union used its collective strength in obtaining from the employer the benefits for retirees as a part of the contract negotiated by the union and the employer. The employer cannot now attempt to regain from the individual retirees what it gave up in the collective bargaining process.

I would hold that an employer seeking a modification of a collective bargaining agreement whereby it could distribute benefits different from those it had previously agreed to pay would be required to seek the union's consent to such a modification. To hold otherwise and to permit the employer to completely bypass the union and go directly to individual beneficiaries to effect a change in the contract would pit the sophistication and power of an employer against the unorganized and less sophisticated individual retirees. As this Court itself observed in the *Pittsburgh Plate Glass* case,

> [r]etired employees have no economic or bargaining power within this system. Their financial security derives from past economic power pragmatically and prudently

> exercised. Once retirement benefits have been bargained for, earned, and become payable, the employer may not recant on his contractual obligation to pay them.

Pittsburgh Plate Glass Co. v. *N.L.R.B.*, 427 F.2d 936, 946 (6th Cir. 1970), *aff'd sub nom. Allied Chemical & Alkali Workers* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971).

In my opinion, it would be a dilution of that "past economic power pragmatically and prudently exercised" and a destruction of the balanced power that is the keystone to collective bargaining to permit the employer to "recant on his contractual obligation," do an "end run" around the union with which it bargained, and then claim accord and satisfaction as a result of its direct dealing with the retirees.

2.

Once Yard-Man executed the collective bargaining agreement, strong federal policy required that it adhere to its commitments, and Congress specifically placed jurisdiction in the federal courts to enforce those obligations. Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a). It is Congressional policy that the administration of collective bargaining contracts be accomplished under a uniform body of federal substantive law. *Smith* v. *Evening News Ass'n*, 371 U.S. 195, 200 (1962).

In the face of this fundamental policy that all collective bargaining contracts should be honored and enforced under a uniform body of federal law, I am at a loss to understand why this policy should be less important in cases concerning bargained for benefits for retirees than in cases concerning bargained for benefits for active employees. I simply cannot agree with the majority's statement that, "[w]hile the union may have bargained for and received benefits for retirees, it does not have the same interest in the enforcement of those contractual rights on the behalf of individual retirees that it

has in the terms and conditions of employment of active employees." I find it difficult to believe that a union, having negotiated benefits for retirees, undoubtedly at the expense of the active employees, has any less interest in requiring the employer to fulfill its obligations to the retirees under the agreement than it has in requiring the employer to fulfill other obligations contained in the agreement. As the Supreme Court said in *Pittsburgh Plate Glass*,

> [t]he Board stated that "the Union and current employees have a legitimate interest in assuring that negotiated retirement benefits are in fact paid and administered in accordance with the terms and intent of their contracts." 177 N.L.R.B., at 815. That interest is undeniable.

404 U.S. at 176 n. 17.

In a very recent case in our own Circuit involving a union official responsible for assisting retirees, beneficiaries and surviving spouses with benefits under pension and insurance plans, this Court said,

> [o]ne of the most sensitive functions performed by a union is the securing of benefits and the resolution of issues surrounding the rights to benefits. This is of particular concern to union officers since it provides one of the most visible means for the union to show that it is meeting the needs of its members.

Cehaich v. *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America*, No. 81-1134, slip op. at 9 (6th Cir. June 16, 1983).

Not only does the union have "a legitimate interest in protecting the rights of the retirees," but, as in the present case, when a union actually undertakes representation of the retirees some authority indicates that it has a *duty* to protect their vested rights. See *Toensing* v. *Brown*, 528 F.2d 69, 70 (9th Cir. 1975), in which the court said,

> [i]f the union does undertake to represent retirees, its duty of fair representation requires that their vested retirement rights not be disturbed.

See also Nedd v. *United Mine Workers of America*, 556 F.2d 190, 200 (3d Cir. 1977) (when union elects to enforce the employer's obligations, duty of fair representation applies). An employer's circumvention of the union and direct dealing with its retirees in an attempt to modify their contractual vested interests directly interferes with the legitimate interest of the union and its duty to the retirees it represented in the collective bargaining process.[5] To condone this, in my opinion, would be a subversion of the concept of collective bargaining and a threat to stable management-labor relationships and the "industrial peace" that is the ultimate goal of federally protected collective activity. *Vaca* v. *Sipes*, 386 U.S. 171, 182 (1967).

3.

When determining the rule of law that will best effectuate federal labor policies, the Court need not limit itself to considering only those policies that prompted passage of the Labor Management Relations Act, but should look also to other expressions of federal policy. The Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 *et seq.*

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[5] I do not mean to imply that a union is always under some general duty to fairly represent all of the employer's retirees. I suggest only that where, as in the present case, a union has actually undertaken to represent the retirees in a § 301 action to enforce their contractual rights against the employer, a duty of fair representation arises. Inasmuch as the conduct of the union in this regard is not an issue in this case, I fully agree with the majority that any issue of fair representation is "not squarely presented" by the facts of the present case (p. 18 n. 15). What is presented, however, is the question of whether the employer's deliberate attempt to bypass the union — the plaintiff in this case — interferes with the union's right to prosecute the action on behalf of the retirees as well as the union's assumed responsibilities to those retirees as their representative in this litigation. In my opinion, it does.

(ERISA), for example, is a strong expression of Congress' concern that retirement benefits be protected. As the Ninth Circuit Court of Appeals stated, "[o]ne of the foremost concerns of Congress in enacting the Act was to assure workers that retirement benefits would be available when needed." *Connolly* v. *Pension Benefit Guaranty Corp.*, 581 F.2d 729 (9th Cir. 1978). Congressional findings and declaration of policy are set forth in 29 U.S.C. § 1001(a), which provides as follows:

> Congress finds that . . . the continued well-being and security of millions of employees and their dependents are directly affected by [employee benefit] plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations.

It is undisputed that ERISA does not cover the Improved Plan at issue in this case. However, even though the Act does not cover this plan, the expressed policy considerations that prompted passage of the Act have application to non-ERISA retirement plans and should be considered in determining the rule that will best effectuate federal policy. I believe that the majority's holding that under the circumstances present in this case an employer can assert the affirmative defense of accord and satisfaction is inconsistent with the Congressional concern for the protection of retirement benefits.

C.

I would hold that when an employer initiates a modification of its retirees' vested benefits without the approval of the union that negotiated those benefits and without the *express* approval of the retirees themselves, the employer, as a matter of federal substantive law, cannot later raise accord and satisfaction or estoppel as defenses in an action to enforce the employer's obligations under the collective bargaining agreement.

To hold otherwise is contrary, in my opinion, to the Supreme Court's charge that in § 301 actions courts are to utilize state law only if it is "the rule that will best effectuate the federal policy." *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448, 457 (1972).

Such a holding in this case would not preclude the adoption into federal substantive law of the principle of accord and satisfaction in an appropriate § 301 action. For example, the result reached in *Keppard* v. *International Harvester Co.*, 581 F.2d 764 (9th Cir. 1978) (a case cited by the majority in support of its position), in which the Ninth Circuit Court of Appeals upheld an employer's reliance on the California law of accord and satisfaction, would not necessarily be different under the rule of law that I suggest today. In that case the employee asked his union to press a claim for back wages. The union and the employer eventually settled the claim and the employer tendered to the employee a check for the agreed upon amount. The employee, knowing that the company considered the check a full settlement of his back pay claim, accepted and cashed the check. The district court held, and the court of appeals agreed, that the employee's action completed an accord and satisfaction under California law. *International Harvester*, therefore, involved an individual employee dispute under a collective bargaining agreement in which the employee was represented by the union, a settlement of that dispute by the employer and the union with the recommendation of the union that the employee accept the settlement check, and an awareness by the employee that the check he received was in settlement of the dispute. This type of case is a far cry from one in which the employer decides to change the benefits due an entire class of beneficiaries under the collective bargaining agreement, intentionally bypasses the union representing those beneficiaries, arbitrarily sends the beneficiaries something other than required by its contract with the union, and then relies upon their silence in asserting common law defenses of accord and satisfaction or estoppel.

VI.

While retirees, as a matter of statutory language and legislative history, do not have the protection of the unfair labor practice statutes against an employer desiring to change their benefits, they do have the protection of federal substantive law as fashioned by the federal courts in a manner consistent with national labor policies. As the Supreme Court recently reaffirmed, quoting former Justice Goldberg in *Humphrey* v. *Moore*, 375 U.S. 335, 358 (1964),

> [i]t is of the utmost importance that the law reflect the realities of industrial life and the nature of the collective bargaining process. We should not assume that doctrines evolved in other contexts will be equally well-adapted to the collective bargaining process.

Del Costello v. *International Brotherhood of Teamsters*, No. 81-2386, slip op. at 20 (June 8, 1983).

Under the circumstances of this case, doctrines of accord and satisfaction and estoppel, developed in other contexts, should not enable an employer to bypass the union with which it dealt in the collective bargaining process and to modify vested pension benefits in reliance upon silent acquiescence of retirees who were presented not with an option but with an accomplished fact.

For the reasons set forth above, I respectfully dissent from Part II of the majority opinion.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 81-1718
(Filed: Sep 9 1983)

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, (UAW) and LOCAL 134, UAW,
Plaintiffs-Appellees,

vs.

YARD-MAN, INCORPORATED,
Defendant-Appellant.

Before: KENNEDY, Circuit Judges; BROWN, Senior Circuit Judge; and HOLSCHUH, District Judge.

JUDGMENT

ON APPEAL from the United States District Court for the Eastern District of Michigan.

THIS CAUSE came on to be heard on the record from the said District Court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be and the same is hereby

affirmed in part, reversed in part and the case is remanded for further proceedings consistent with the opinion of this Court.

Each party to bear its own costs on this appeal.

ENTERED BY ORDER OF THE COURT

(s) John P. Hehman,
Clerk

Issued as Mandate: October 3, 1983

COSTS: None

Filing fee ..... $
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A True Copy.

Attest:

(s) Judy K. King
Deputy Clerk